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No. 06-672

IN THE

Supreme Court of the United States

KENNETH P. WILK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM D. MATTHEWMAN
SEIDEN, ADLER & MATTHEWMAN
2300 Glades Rd.
West Tower—Ste. 340
Boca Raton, FL 33341
(561) 416-0170

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

J. RAFAEL RODRIGUEZ
LAW OFFICES OF J. RAFAEL RODRIGUEZ
6367 Bird Rd.
Miami, FL 33155
(305) 667-4445

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Federal Death Penalty Act of 1994 provides that the government must file notice of its intent to seek the death penalty a "reasonable time before the trial." 18 U.S.C. § 3593(a). The question presented is:

Whether the timeliness of a death notice should be determined by comparing the date the notice is filed to the scheduled trial date in existence at that time (as the Fourth Circuit has held), or by comparing the date the notice is filed to the date when trial ultimately begins (as the Eleventh Circuit held below).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Kenneth P. Wilk was defendant-appellant in the court of appeals and defendant in the district court. Respondent United States was plaintiff-appellee in the court of appeals and plaintiff in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth P. Wilk respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is published at 452 F.3d 1208 (11th Cir. 2006). The opinion of the district court (App., *infra*, 32a-51a) is published at 366 F. Supp. 2d 1178 (S.D. Fla. 2005).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 20, 2006. The court of appeals denied a petition for rehearing en banc on August 15, 2006 (App., *infra*, 52a-53a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Death Penalty Act of 1994 (Title VI of the Violent Crime Control and Law Enforcement Act of 1994), Pub. L. No. 103-322, §§ 60001-26, 108 Stat. 1796, 1959 (codified at 18 U.S.C. §§ 3591-3599), are set forth in the Appendix (App., *infra*, 54a-59a). The statute provides in most pertinent part:

> (a) Notice by the government.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—
>
> (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
>
> (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.
>
> * * * The court may permit the attorney for the government to amend the notice upon a showing of good cause.

18 U.S.C. § 3593(a).

STATEMENT OF THE CASE

This case concerns an issue under the Federal Death Penalty Act that has divided the courts of appeals. That statute provides that, in capital cases, the government "shall, *a reasonable time before the trial* * * *, sign and file with the court, and serve on the defendant," notice of its intent to seek the death penalty. 18 U.S.C. § 3593(a) (emphasis added). The Fourth Circuit has held that, when

determining whether a notice was filed a "reasonable time before the trial," a court must measure the interval between the death notice's filing and *the scheduled trial date in existence at the time the notice is filed*—even if the trial is later rescheduled. *United States* v. *Ferebe*, 332 F.3d 722, 737 & n.6 (4th Cir. 2003); *United States* v. *Breeden*, 366 F.3d 369, 374-375 (4th Cir. 2004). In the decision below, the Eleventh Circuit expressly rejected that holding and ruled instead that the timeliness of a death notice must be determined by examining the interval between the notice's filing and *the date the trial ultimately begins*. App., *infra*, 25a-28a & n.28.

I. TRIAL COURT PROCEEDINGS

A. The Arrest and Indictments

On August 19, 2004, Deputy Sheriff Todd Fatta and Sergeant Angelo Cedeno of the Broward County Sheriff's Office forcibly entered the home of petitioner Kenneth Wilk to execute a federal search and arrest warrant. App., *infra*, 3a. Wilk's domestic partner, Kelly Ray Jones, had been arrested earlier on child-pornography charges, and Wilk was suspected of tampering with evidence in that case. *Id.* at 2a-3a. When Fatta and Cedeno entered Wilk's home, shots were fired by both Wilk and the officers; both officers were struck, and Fatta later died from his injuries. *Id.* at 3a; 2/28/05 Tr. at 28. Wilk was arrested at the scene. App., *infra*, 3a.

In a statement to police, Wilk claimed the shooting was accidental. He explained that he had received death threats from neighbors and believed Fatta and Cedeno were intruders. 2/28/05 Tr. at 46, 71, 105. Wilk's explanation was corroborated by the fact that he has difficulty hearing and suffers from AIDS dementia. *Id.* at 53, 63; 8/20/04 Tr. at 4. The government did not accept Wilk's account. It noted that, years earlier, Wilk had posted threats directed at law enforcement on the Internet. App., *infra*, 2a.

Seven days after the shooting, on August 26, a grand jury returned a non-capital indictment charging Wilk with the child-pornography and evidence-tampering offenses underlying the warrant for his arrest. App., *infra*, 3a. Approximately two months later, on October 21, the grand jury returned a superseding indictment that added capital counts arising from the shooting. *Id.* at 5a. In all, Wilk was charged with the murder of an individual (Fatta) assisting a federal officer in his duties in violation of 18 U.S.C. §§ 1114 and 1111(a); attempted murder of an individual (Cedeno) assisting a federal officer in his duties in violation of 18 U.S.C. §§ 1114 and 1113; possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1) and (j)(1); obstruction of justice in violation of 18 U.S.C. § 1503(a); possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2; and conspiracy to obstruct justice in violation of 18 U.S.C. § 1512(k). Superseding Indictment at 8-15 (Dist. Ct. Docket #70).

At Wilk's initial appearance, the district court appointed counsel who had capital experience to represent him; several weeks later, the court appointed a second lawyer who was qualified to handle death penalty cases and authorized funds for an investigator and mitigation specialist. App., *infra*, 3a, 5a. Wilk's counsel made presentations to the U.S. Attorney's Office for the Southern District of Florida and to the Capital Case Unit of the Department of Justice in Washington, D.C., in an effort to dissuade the government from seeking the death penalty. *Id.* at 4a & n.3.[1]

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[1] The Attorney General (or in his absence the Deputy Attorney General) must authorize any decision to seek the death penalty. U.S. Attorneys' Manual § 9-10.020. Capital defendants are permitted to present facts to the U.S. Attorney and the Department of Justice concerning the propriety of seeking the death penalty. *Id.* §§ 9-10.030, 9-10.050. Wilk made such a presentation to the U.S. Attorney's Office in Florida on September 22, 2004, and to the Department of Justice in Washington on December 13, 2004. App., *infra*, 4a & n.3.

B. The April 18 Trial Date and February 18 Death Notice

On October 28, shortly after the superseding indictment was filed, the district court scheduled trial for April 18, 2005. App., *infra*, 6a-7a. "[T]he case will go to trial," the court stated, "on the date that the Court assigns, absent good cause being shown." 10/28/04 Tr. at 4. Wilk protested that he could not be ready for a potential death penalty case by that date, but the court overruled his objection. App., *infra*, 7a.

At a status conference held on January 28, 2005, the district court noted that the government had to file a "death notice" if it intended to seek the death penalty. App., *infra*, 8a. The government responded that it "would not make a decision" about whether to seek the death penalty "until February 25 because the new Attorney General had not been confirmed yet." *Ibid.*; see also Gov't Proposed Additional Questions for Juror Questionnaire at 15 (Jan. 21, 2005) (Dist. Ct. Docket #166) ("At this time, the Attorney General has not decided whether the United States should seek the imposition of the death penalty * * * ."). Wilk objected that, in light of the April 18 trial date, notice on February 25 would not afford a "reasonable time" as required by § 3593(a). App., *infra*, 9a. The court responded that "it would probably behoove the defendant to assume that the government will be seeking the death penalty," and asked the government to provide a "preliminary list" (or "heads up") of the non-statutory aggravating factors it intended to rely on if it sought the death penalty. *Ibid.*; 1/28/05 Tr. at 8-9. The government agreed, but noted that the list would not be binding. 1/28/05 Tr. at 8-9. Wilk objected to that procedure as inconsistent with the statute. *Id.* at 9-10. The court overruled the objection, "confirmed that the trial was set for April 18, 2005," and ordered the government to file its formal death notice by February 18, 2005. App., *infra*, 9a.

On February 4, 2005, the government sent defense counsel its non-binding list of aggravating factors. App., *infra*, 9a n.7. At a February 10 hearing, the government stated that the Attorney General still had not decided whether to seek the death penalty. *Id.* at 10a. The magistrate judge advised Wilk to "treat the case as a death penalty case" and stated that "the April 18 trial date was firm and fast approaching." *Ibid.*

Finally, on February 18, 2005, two months before the scheduled trial date, the government filed its death notice and orally advised counsel that it would seek the death penalty. App., *infra*, 11a, 42a n.3. Due to an oversight and the intervening holiday weekend, however, the government did not mail the notice to defense counsel until February 22, and counsel did not receive it until February 24. *Id.* at 42a n.3.

C. The Motion To Strike and Related Proceedings

On March 8, 2005, Wilk moved to strike the death notice as untimely. App., *infra*, 12a. Two days later, on March 10, the government filed a second superseding indictment that included an additional capital murder count based on the same conduct. *Ibid.* On March 15, the government sought and obtained leave to amend the death notice to reflect that change, without altering the aggravating factors alleged. *Id.* at 14a. Wilk moved to strike the amended notice, and then moved for an immediate ruling on his motions to strike. *Ibid.*

The district court held status conferences on March 30 and April 1. App., *infra*, 14a-17a. It advised that it would be available to conduct evidentiary hearings "any time during the week of April 11th, which is the week prior to trial," and promised an "expeditious hearing" before trial on any matters that might arise. 3/30/05 Tr. at 7-8. Defense counsel reminded the court that Wilk's motion to strike the death notice was still pending, and stated that, although he could be ready for a non-capital trial by April 18, he could

not be ready for a capital trial. *Id.* at 22-23; 4/1/05 Tr. at 6. The government stated that it would be "ready in some fashion or another" by that date, but expressed concern that Wilk was claiming "lack of notice." 3/30/05 Tr. at 9-10. It observed that, if the case were rescheduled for summer or fall, "the defense would certainly not have the ability to claim * * * that they don't have sufficient notice * * * to defend a death penalty matter." *Id.* at 15.

Wilk objected that he should not have to forfeit his speedy trial rights to remedy the government's failure to file a timely death notice, and urged the court to strike the notice and proceed with a non-capital trial on April 18. App., *infra*, 16a-17a; 4/1/05 Tr. at 6. The court, however, opined that "both sides need additional time to properly prepare this case" and rescheduled trial for August 29, 2005. App., *infra*, 17a.

D. The District Court's Denial of the Motion To Strike

On April 27, 2005, the district court issued an opinion denying Wilk's motion to strike the death notice. App., *infra*, 32a-51a. The court observed that the critical issue in determining whether the notice was filed a "reasonable time" before trial was how to measure the interval between the notice's filing and the trial. *Id.* at 39a. The appropriate starting date was February 18—the day the death notice was filed. But two possibilities existed for the ending date. One was April 18—the scheduled trial date that was in place when the death notice was filed. The other was August 29—the date to which trial was rescheduled *after* the death notice was filed. See *ibid.*

The district court observed that the Fourth Circuit had recently addressed precisely that issue in *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003). App., *infra*, 37a. That case—authored by then-Judge Luttig—held that the timeliness of a death notice must be "'measured at the instant the [D]eath Notice was filed,'" without regard to post-filing

developments. *Id.* at 41a (quoting *Ferebe*, 332 F.3d at 737). The Fourth Circuit explained that, to quantify the relevant interval, "a court naturally must have reference to *two* dates: the first, obviously, being the date the Death Notice is filed, and the second, obviously, being the trial date." *Id.* at 737 n.6. *Ferebe* held that the relevant "trial date" is the "*scheduled* trial date" in existence "as of the moment of the Death Notice's filing." *Id.* at 737 & n.6 (emphasis added). The statute, *Ferebe* declared, "references the *set* trial date as the date of trial." *Id.* at 737 n.6 (emphasis added); see also *id.* at 739 (relevant trial date is the "set trial date at the moment the Death Notice was filed"). The reasonableness of the resulting interval—the time between the death notice's filing and the trial date in existence when the death notice is filed—is then evaluated in light of other factors such as the "nature of the charges," the "nature of the aggravating factors," and the "status of discovery." *Id.* at 737.

In this case, the death notice was filed on February 18, 2005. "[A]t the moment the Death Notice was filed," the scheduled trial date was 59 days away, on April 18. Accordingly, under *Ferebe*, the question would be whether 59 days was a "reasonable time before the trial" for the filing of a death notice. Wilk argued that it was not, pointing out that death notices are filed an *average* of 11 months before trial. McNally Decl. ¶ 5 (Dist. Ct. Docket #320, Exh. C, at 2).

The district court, however, measured timeliness on the basis of the *rescheduled* trial date of August 29. App., *infra*, 41a. The court held that April 18 was not the pertinent date because, according to the court, it had continued trial for reasons unrelated to the death notice. *Id.* at 39a-41a. On the basis of that later date, the notice was filed more than six months before trial. *Id.* at 42a. The court held that, in light of the nature of the charges, the nature of the alleged aggravating factors, the status of discovery, and other considerations, six months was adequate time for Wilk to prepare. *Id.* at 43a-47a.

II. THE COURT OF APPEALS' DECISION

Wilk filed an interlocutory appeal, and the court of appeals affirmed. App., *infra*, 1a-31a. The court of appeals first rejected the government's contention that it lacked jurisdiction, holding that a district court order denying a defendant's motion to strike a death notice is immediately appealable under the collateral order doctrine. See *id.* at 20a-21a (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). The court observed that the Fourth Circuit had reached the same conclusion in *Ferebe*. *Id.* at 21a.

Turning to the merits, however, the court held that the death notice was filed a reasonable time before trial. The court began by addressing how reasonableness should be measured. It did not dispute that 59 days' notice was likely insufficient. Rather, it "assum[ed] *arguendo* that the Death Notice might have been otherwise problematic without the continuance." App., *infra*, 28a n.29. But the court held that the death notice was filed six months before trial because the relevant trial date was the *continued* trial date of August 29, not the *scheduled* date of April 18. *Id.* at 25a-30a. The court of appeals opined that "nothing in § 3593 * * * restricts courts to counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." *Id.* at 25a-26a. The statute, the court of appeals observed, refers to "'a reasonable time before the *trial*,' not a reasonable time before the date the trial was scheduled to begin." *Id.* at 25a.

The court added that, "even if the district court continued the trial to August 29 * * * wholly or in part to remedy a Death Notice that would otherwise be untimely without a continuance * * *, the district court acted properly." App., *infra*, 26a-27a. "[T]he obvious purpose of the § 3593(a) notice requirement," the court stated, "is to make sure a defendant has adequate time to prepare for a death defense. Continuing the trial after the Death Notice is filed does not undermine but rather preserves the

defendant's statutory right not to stand trial for his life without reasonable notice of the government's intent to seek the death penalty." *Id.* at 27a.

The Eleventh Circuit "recognize[d] that the Fourth Circuit" had adopted the contrary approach. App., *infra*, 27a n.28. In particular, the Fourth Circuit had "analyzed the time interval as 'the period of time remaining before trial, measured at the instant the Death Notice was filed.'" *Ibid.* (quoting *Ferebe*, 332 F.3d at 737). But the Eleventh Circuit "d[id] not find [the Fourth Circuit's position] persuasive." *Ibid.* Quoting from Judge Niemeyer's dissent in *Ferebe*, the Eleventh Circuit reiterated its view that § 3593(a) refers to a reasonable time before *trial*, not a reasonable time before the scheduled *date of trial*. See *ibid.* (quoting 332 F.3d at 741 (Niemeyer, J., dissenting)).

The court of appeals also asserted that its decision was supported by practical considerations. It noted that trial dates often change, and that Wilk's own trial date had been continued twice previously. App., *infra*, 28a. It observed that deciding whether to seek the death penalty is a protracted process. *Id.* at 28a-29a. And it held that district courts should have flexibility to manage their dockets. *Id.* at 29a.[2]

Using August 29 as the relevant trial date, the Eleventh Circuit found that the death notice was filed six months before trial. App., *infra*, 25a. It concluded that, under the circumstances, six months was a reasonable time before trial. *Id.* at 30a. It accordingly affirmed the district court's denial of Wilk's motion to strike. *Id.* at 31a. On August 15, 2006, the court denied Wilk's petition for rehearing and rehearing en banc. *Id.* at 52a-53a. Wilk's trial is currently scheduled to begin in April 2007.

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[2] The court of appeals also rejected Wilk's alternative argument that the district court's ruling was erroneous even on its own terms because the reasons for the continuance were related to the death notice. App., *infra*, 26a.

REASONS FOR GRANTING THE PETITION

This case presents a square circuit conflict on an important and recurring issue of federal law—how to determine the timeliness of the government's notice of intent to seek the death penalty under 18 U.S.C. § 3593(a). In *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003), and *United States* v. *Breeden*, 366 F.3d 369 (4th Cir. 2004), the Fourth Circuit held that courts must measure the timeliness of such a notice "as of the moment of the Death Notice's filing"—in other words, by measuring the interval between the filing of the notice and the "scheduled trial date" in existence when the notice is filed. *Ferebe*, 332 F.3d at 737 & n.6; see also *id.* at 739 (the "set trial date at the moment the Death Notice was filed"). In the decision below, the Eleventh Circuit expressly rejected the Fourth Circuit's approach; labeled the Fourth Circuit's rationale "unpersuasive"; and adopted instead the approach advocated by the *Ferebe* dissent. App., *infra*, 25a-28a & n.28. The Eleventh Circuit thus held that timeliness should be measured by the interval between the death notice's filing and the date when trial *ultimately begins*—even if trial is continued *after* the death notice is filed. *Ibid.*

This issue is important and recurring. How to measure the timeliness of a death notice is a question that arises in each of the scores of capital cases the United States pursues each year. Many other courts have addressed the issue and reached widely varying conclusions. As a result, critical procedures governing federal capital prosecutions now vary with the happenstance of the district in which the case arises. This case presents an ideal vehicle for resolving this important issue and restoring uniform and evenhanded administration of the Federal Death Penalty Act throughout the Nation.

I. FEDERAL COURTS ARE DIVIDED OVER THE PROPER INTERPRETATION OF 18 U.S.C. § 3593(a)

A. The Eleventh Circuit's Interpretation Squarely Conflicts with the Fourth Circuit's Decisions in *Ferebe* and *Breeden*

The decision below squarely and expressly conflicts with decisions of the Fourth Circuit on the proper construction of 18 U.S.C. § 3593(a).

1. In *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003) (Luttig, J.), the Fourth Circuit established a framework for assessing the timeliness of death notices under § 3593(a). Of particular importance here, the Fourth Circuit held that, when determining whether a notice was filed a reasonable time before trial, a court must measure the interval between the date the death notice was filed and the scheduled trial date in existence at the moment of the death notice's filing. The Fourth Circuit held that timeliness depends on "the period of time remaining before trial, *measured at the instant the Death Notice was filed* and irrespective of the filing's effects." *Id.* at 737; see also *id.* at 737-738 ("essential element[]" for "determining the pre-trial objective reasonableness of the timing of a Death Notice" is "the period of time that remains before trial, as of the moment of the Death Notice's filing"). "To quantify this interval," *Ferebe* explained, "a court naturally must have reference to *two* dates: the first, obviously, being the date the Death Notice is filed, and the second, obviously, being the trial date." *Id.* at 737 n.6. The "trial date" for purposes of § 3593(a) is the "*scheduled* trial date" in existence "as of the moment of the Death Notice's filing." *Id.* at 737 & n.6 (emphasis added); see also *id.* at 737 n.6 (statute "references the set trial date as the date of trial"); *id.* at 738 ("at the instant the Death Notice was filed, [the] date * * * on which * * * trial was set to begin"); *id.* at 738 n.7 ("the time trial was * * * set to begin"); *id.* at 739 ("set trial date at the moment the Death Notice was filed"); *id.* at 740 (date for

which "trial was set" "at the moment of the Death Notice's filing"); *ibid.* ("at the time of the Death Notice's filing, [the] date * * * on which [the] trial was set to start").

The Fourth Circuit explained that its construction was compelled by the statute's text and purpose. Section 3593(a), it observed, establishes a "statutorily-created right not to be tried for a capital sentence without having received reasonable notice." *Ferebe*, 332 F.3d at 731. Because of the statute's "prophylactic" character, a defendant's rights are denied immediately "at the point when he proceeds toward trial * * * in the absence of a reasonable time between his receipt of the Death Notice and his capital trial." *Id.* at 731-732. The statute therefore "necessitates a *pretrial* inquiry into the objective reasonableness of the notice provided." *Id.* at 731 (emphasis altered); see also *id.* at 730 (statute requires "inquiry into pre-trial, objective reasonableness"); *id.* at 734 (adopting an "objective assessment of pre-trial reasonableness"). That pretrial inquiry could not occur, however, if reasonableness were to depend on the date trial ultimately happens to begin, since the ultimate trial date is always subject to change. Accordingly, the Fourth Circuit ruled that timeliness must be determined on the basis of the "scheduled trial date" in existence "as of the moment of the Death Notice's filing." *Id.* at 737 & n.6.

Dissenting, Judge Niemeyer argued that reasonableness should be determined in light of post-filing developments in order to assess the extent of any prejudice to the defendant. See 332 F.3d at 748-750. He criticized the majority for "read[ing] the statute to require a death penalty notice to be given a reasonable time before the [scheduled] *date of trial*, not before the *trial*, as the statute provides." *Id.* at 741 (citation omitted). And he disagreed with the majority's approach because it "freezes the inquiry into the reasonableness of timing as of the time the notice is filed." *Id.* at 749. That approach, he asserted, "denies the [trial] court

any flexibility in managing the period of trial preparation by scheduling or postponing trial to give the defendant a reasonable time to prepare." *Ibid.* The majority, however, rejected the dissent's approach. It vacated the district court's decision and remanded for an application of the standard it had articulated. *Id.* at 740.[3]

The Fourth Circuit reaffirmed *Ferebe* in *United States* v. *Breeden*, 366 F.3d 369 (4th Cir. 2004). In that case, the district court had continued the trial *before* the government filed its death notice (for reasons unrelated to the filing of the notice). *Id.* at 372. The defendant nevertheless sought to prohibit the death notice, urging the district court to rely on the previously scheduled trial date. See *id.* at 371-372. The district court refused, and the Fourth Circuit affirmed. Writing for the panel, Chief Judge Wilkins explained that, under *Ferebe*, timeliness must be "'measured at the instant the Death Notice was filed.'" *Id.* at 374. He concluded that the trial court had correctly applied that rule because it had relied on the "scheduled trial date" "existing at the time the death notice was filed." *Id.* at 375; see also *id.* at 374 ("the then-scheduled trial date"); *ibid.* ("scheduled" trial date "[o]n the date the Government filed the death notice"). Because the scheduled trial date was nearly seven months away when the government filed its death notice, the court held that the government had filed its notice a "reasonable time before trial" within the meaning of § 3593(a). *Id.* at 374-375.

2. In the decision below, by contrast, the Eleventh Circuit took the diametrically opposite approach. Whereas *Ferebe* and *Breeden* direct trial courts to rely on the "set trial date" or "scheduled trial date" "as of the moment of

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[3] On remand, the district court concluded that the 39 days remaining before the scheduled trial date was "not enough time for Ferebe to have prepared his death defense," and struck the notice. *United States* v. *Ferebe*, No. Crim. L-97-0329, 2005 WL 1429261, at *8 (D. Md. June 16, 2005).

the Death Notice's filing," *Ferebe*, 332 F.3d at 737 & n.6; *Breeden*, 366 F.3d at 375, the Eleventh Circuit held that courts should look to the date on which trial *ultimately begins*—even if that date is set *after* the death notice is filed. App., *infra*, 25a-28a. In so holding, the Eleventh Circuit expressly "reject[ed] [the] argument" that the relevant date was "the scheduled trial date at the time the original Death Notice was filed." *Id.* at 25a. "[T]he Death Notice," the Eleventh Circuit opined, "must be filed 'a reasonable time before the *trial*,' not a reasonable time before the date the trial was scheduled to begin when the Death Notice was formally filed." *Ibid.*; see also *ibid.* ("Section 3593(a) does not state 'before the date of trial,' but rather states 'before the trial * * * .'"). "Simply put," the court declared, "there is nothing in § 3593 that restricts courts to counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." *Id.* at 25a-26a.

Further rejecting the Fourth Circuit's requirement—that timeliness be measured "at the moment the Death Notice was filed," not in light of post-filing developments, *Ferebe*, 332 F.3d at 739—the Eleventh Circuit also held that an otherwise untimely death notice can be rendered timely after the fact by continuing the trial. App., *infra*, 26a-28a. Continuing the trial to ensure adequate preparation time, the Eleventh Circuit stated, "is to be commended even if in the process it cures what might have otherwise been an untimely Death Notice." *Id.* at 28a.

The Eleventh Circuit expressly acknowledged that its interpretation of § 3593(a) conflicts with the Fourth Circuit's. It "recognize[d] that the Fourth Circuit analyzed the time interval as 'the period of time remaining before trial, measured at the instant the Death Notice was filed.'" *Id.* at 27a n.28 (quoting *Ferebe*, 332 F.3d at 737). But the Eleventh Circuit "*d[id] not find [the Fourth Circuit's interpretation] persuasive.*" *Ibid.* (emphasis added). It dis-

agreed with "*Ferebe*'s suggestion that a court may not effectively address the concerns raised by a motion to strike a Death Notice as untimely by postponing the trial." *Ibid.*

The Eleventh Circuit did not merely reject the Fourth Circuit's approach in *Ferebe* and *Breeden*; it adopted the approach proposed by the *Ferebe* dissent. The Eleventh Circuit approvingly quoted Judge Niemeyer's criticism that *Ferebe* "'read[] the statute to require a death penalty notice to be given a reasonable time before the *date of trial* * * * not before the *trial*, as the statute provides.'" App., *infra*, 27a n.28; see also *id.* at 25a ("Section 3593(a) does not state 'before the date of trial,' but rather states 'before the trial * * * .'"). The Eleventh Circuit, moreover, adopted the *Ferebe* dissent's view that trial courts should have "flexibility in managing the period of trial preparation by scheduling or postponing trial to give the defendant a reasonable time to prepare." 332 F.3d at 749 (Niemeyer, J., dissenting); see App., *infra*, 26a-28a.

The difference between the two approaches was crucial to the outcome here. Under *Ferebe*, the death notice was filed a mere 59 days before trial. See p. 8, *supra*. By contrast, the *average* interval between the filing of a death notice and trial is 11 months. McNally Decl. ¶ 5 (Dist. Ct. Docket #320, Exh. C, at 2). Thus, the notice in this case was filed less than *one-fifth* of the norm before the scheduled trial date. Courts have routinely found comparable periods unreasonable. See, *e.g.*, *United States* v. *Cuong Gia Le*, 316 F. Supp. 2d 343, 354 (E.D. Va. 2004) (94 days); *United States* v. *Ferebe*, No. Crim. L-97-0329, 2005 WL 1429261, at *8 (D. Md. June 16, 2005) (39 days); *United States* v. *Hatten*, 276 F. Supp. 2d 574, 579-580 (S.D. W. Va. 2003) (36 days). No court, to our knowledge, has found less than 60 days before trial to be a reasonable time for the filing of an initial death notice under § 3593(a).[4]

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[4] The inadequacy of 59 days' notice was particularly apparent here: When the district court ruled on Wilk's motion to strike on April

Doubtless for that reason, the Eleventh Circuit did not dispute that, under the Fourth Circuit's approach, the death notice in this case was likely untimely. See App., *infra*, 28a n.29 (assuming *arguendo* that "the Death Notice might have been otherwise problematic without the continuance"). Fifty-nine days is an absurdly short period of time to prepare for a capital case given the enormous responsibilities involved.[5] It was *only* by rejecting the Fourth Circuit's approach and measuring timeliness on the basis of the *rescheduled* trial date of August 29 that the Eleventh Circuit was able to deem the death notice timely. See *id.* at 25a.

B. Other Courts Are in Disarray

Other courts across the Nation are also grappling with this issue. The result has been disparate treatment, protracted delays, and jurisprudential disarray.

27—one week *after* the previously scheduled trial date—discovery *still* was not complete. See App., *infra*, 45a-46a. The district court nonetheless suggested that Wilk had adequate notice even if April 18 were the relevant trial date because the government's death notice was preceded by a scheduling order notifying Wilk of the date by which the government would file any death notice. App., *infra*, 42a-43a. Not surprisingly, the Eleventh Circuit declined to endorse that bizarre theory. Cf. *id.* at 28a n.29. The relevant point for present purposes, however, is that no court has suggested that two months, standing alone, is sufficient.

[5] See Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 923 (2003) ("[I]t is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding * * *. 'Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.'"); *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (requiring counsel to make "'efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'").

In the Fourth Circuit, district courts follow *Ferebe*'s holding that timeliness must be measured on the basis of the scheduled trial date when the notice was filed, and that an untimely notice therefore cannot be rendered timely by continuing the trial. See *United States* v. *Cuong Gia Le*, 311 F. Supp. 2d 527, 532 & n.10 (E.D. Va. 2004) (timeliness must be "'measured at the instant the Death Notice was filed,'" and "an untimely Death Notice cannot be rescued by delaying the trial date"); *United States* v. *Hatten*, 276 F. Supp. 2d 574, 579 (S.D. W. Va. 2003) ("[T]he Court must look at the trial date that was in existence at the time of [the] filing, even though the issuance of the Death Notice may affect the viability of the trial date."). One court has qualified *Ferebe* by holding that "[c]ourts are not restricted to merely counting days between a Death Notice and the scheduled trial date if the court knows, and the parties are reasonably aware, that the matter is not actually proceeding to trial on that date." *United States* v. *Ponder*, 347 F. Supp. 2d 256, 267 (E.D. Va. 2004).[6]

District courts in other circuits have reached inconsistent results. In *United States* v. *Pepin*, 367 F. Supp. 2d 315 (E.D.N.Y. 2005), the district court held that it could post-

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[6] The district court below interpreted these cases to hold that the scheduled trial date need not be used if trial is later continued for reasons unrelated to the death notice. See p. 8, *supra*. But none of the cited cases supports that exception; *Ferebe* states that timeliness must be "measured at the instant the Death Notice was filed *and* irrespective of the filing's effects," 332 F.3d at 737 (emphasis added); each of the cited cases was merely applying that holding. See *United States* v. *Breeden*, No. 3:03CR00013, 2003 WL 22019060, at *1 (W.D. Va. Aug. 22, 2003) (trial continued *before* death notice was filed *and* for unrelated reasons, cf. 366 F.3d at 374); *Cuong Gia Le*, 311 F. Supp. 2d at 532 ("no scheduled trial date" when notice was filed); *Ponder*, 347 F. Supp. 2d at 267 (similar). The district court's error was rendered moot by the Eleventh Circuit's holding that the rescheduled trial date governs *even if* trial was rescheduled in order to render the death notice timely. App., *infra*, 26a-28a.

pone trial and then measure timeliness on the basis of the rescheduled trial date. It noted *Ferebe*'s contrary rule that "a court may not effectively address the concerns raised by a motion to strike a death notice as untimely by postponing the trial." *Id.* at 318. But it opined that *Ferebe* was "[u]n-persuasive" and "should not be followed in this circuit," at least absent bad faith by the government. *Id.* at 315-316, 318-319.

In *United States* v. *McGriff*, 427 F. Supp. 2d 253 (E.D.N.Y. 2006), the court noted the "flurry of decisions" addressing this issue, and observed that courts were "divide[d]" over both how to measure timeliness and whether trial could be postponed to remedy an untimely notice. *Id.* at 262, 266. The court adopted a middle ground. It "agree[d] with Judge Luttig's conclusion" that timeliness should be measured without regard to the degree of prejudice to the defendant. *Id.* at 267. But it "reject[ed]" the view "followed in the Fourth Circuit" that a court cannot remedy an untimely death notice by postponing trial. *Id.* at 268. It held instead that a court has discretion *either* to strike an untimely notice *or* to continue trial. *Id.* at 269.[7] See also *United States* v. *Colon-Miranda*, 985 F. Supp. 36, 39-40 (D.P.R. 1997) (refusing to grant continuance where delay resulted from "government ambivalence"); *United States* v. *Gomez-Olmeda*, 296 F. Supp. 2d 71, 87 (D.P.R.

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[7] *McGriff* viewed the issue of whether a death notice was filed a reasonable time before trial as distinct from the issue of whether an untimely death notice could be remedied by postponing the trial. 427 F. Supp. 2d at 266-269. Under the Eleventh Circuit's approach here, however, those two issues are one and the same. Because the Eleventh Circuit determines whether notice was filed "a reasonable time before the trial" by looking to the date trial *ultimately begins*, there is no separate "remedy" question: By continuing the trial in response to an otherwise untimely death notice, a court prevents the § 3593(a) violation from occurring in the first place, and thus renders moot the need to "remedy" any violation. See App., *infra*, 26a-28a.

2003) (similar); *United States* v. *Ball*, Crim. No. 1:05-cr-00100 (D.D.C. Oct. 19, 2006) (similar).

Finally, a third court of appeals has tentatively weighed in on the conflict as well. In *United States* v. *Ayala-Lopez*, 457 F.3d 107 (1st Cir. 2006), the First Circuit reviewed the denial of a motion to strike a death notice. The court observed that "[t]he *Ferebe* majority apparently concluded that reasonableness was to be measured without reference to prejudice to the defendant." *Id.* at 108. It then added a "*But cf.*" citation to the Eleventh Circuit's decision here. *Ibid.* Most important for present purposes, the First Circuit then expressed tentative support for the Eleventh Circuit's position. See *ibid.* (assuming "dubitante" [*i.e.*, skeptically] that prejudice is not required). Ultimately, however, the court did not resolve the issue, because it found the notice timely even under *Ferebe*. See *ibid.*

In short, two circuits are expressly divided on the question presented, a third has tentatively weighed in, and a "flurry" of district court decisions have reached conflicting results. The courts are in utter disarray. For that reason alone, the Eleventh Circuit's decision warrants review.

C. The Issue Is Important and Recurring

The consequences of the disarray on this issue are severe. Section 3593(a) applies in every federal prosecution of a capital offense—scores of cases each year.[8] In many of

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[8] More than 40 federal offenses are punishable by death. See Bureau of Justice Statistics, Dep't of Justice, *Capital Punishment, 2004*, app. at 13 tbl.1 (rev. Feb. 1, 2006); Dep't of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, at 1 & n.1 (Sept. 12, 2000). According to the Department of Justice's most recent statistics, 33 prisoners were under a federal death sentence as of December 31, 2004; 10 were sentenced to death during 2004 alone. *Capital Punishment, 2004*, *supra*, at 5 tbl.4. For every case in which a federal defendant is ultimately sentenced to death, moreover, there are roughly five in which the Attorney General authorizes prosecutors to seek the death penalty and more than 20 submitted for his

those cases, the law governing the timing of death notices is now intolerably uncertain. The prosecutor who must file the notice, the defense attorney who must respond, and the judge who must adjudicate are denied certainty not merely over whether a particular notice is timely, but over how to go about making that determination. Elsewhere, the relevant standards may be clear, but they will be totally different depending on the circuit in which the prosecution is brought.

The result is an outpouring of motions and inconsistent decisions. Defendants outside the Fourth Circuit are forced to stand trial on capital charges despite the government's failure to comply with statutory requirements. They may be denied prompt adjudication of their criminal charges when the court continues trial to remedy the *government's* failure to file its death notice on time. By contrast, in the Fourth Circuit, the government's capital charges may be dismissed despite what it perceives to be a fully adequate remedy. In all circuits, both parties and courts suffer through the inevitable delays that attend litigation of this issue, including time-consuming and expensive interlocutory appeals.[9] Particularly in the sensitive area of capital punishment, a defendant's rights under federal law should not depend on the happenstance of the district in which his case is prosecuted.

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consideration. See *Federal Death Penalty System*, *supra*, at T-2 tbl.1A (reporting cumulative statistics for 1995-2000 of 682 submissions (670 not pending), 159 authorizations (108 not pending trial), and 20 death sentences); U.S. Attorneys' Manual § 9-10.010 *et seq.* (prescribing procedures).

[9] In this case, for example, Wilk's capital trial was originally scheduled for April 18 and then August 29, 2005; but because of his interlocutory appeal to the Eleventh Circuit, Wilk's trial is *still* months away. In *Ferebe*, the defendant's interlocutory appeal was pending before the Fourth Circuit for almost two years. 332 F.3d at 726. Interlocutory appeals were also filed in *Breeden* and *Ayala-Lopez*.

The importance of this issue is confirmed by the government's unsuccessful attempt to procure legislation overruling *Ferebe*. See Death Penalty Reform Act of 2006, H.R. 5040, 109th Cong. § 4(1)(B) (2006) (proposing to amend § 3593(a) to authorize a "reasonable continuance" in response to an otherwise untimely death notice). The Chief of the Department of Justice's Capital Case Unit testified before Congress that *Ferebe* was interfering with the government's prosecution of capital cases. See *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary*, 109th Cong., 2006 WLNR 5404524 (Mar. 31, 2006) (statement of Margaret P. Griffey). That too underscores the need for this Court's review.

Finally, the issue is ripe for resolution by this Court. The question has been fully vetted in many thorough opinions, including Judge Luttig's opinion in *Ferebe*, Judge Niemeyer's dissent, the decision below, and the myriad district court opinions grappling with the issue. See pp. 12-20, *supra*. The split is clear and solid, the cases are proliferating, and the resulting disarray affects capital defendants, government lawyers, and courts nationwide.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents an excellent vehicle for resolving the circuit split. The question is squarely presented and almost certainly outcome-determinative. As explained above, p. 8, *supra*, the Fourth Circuit would have ruled that the death notice in this case was filed a mere 59 days before trial. No case to our knowledge has ever held such a short interval reasonable. By adopting a different standard, the Eleventh Circuit ruled that the notice was filed a full six months before trial. Whether the Fourth Circuit's or the Eleventh Circuit's approach is correct thus makes all the difference.

This case, moreover, is bereft of the factual complications that would often impede review of the important issue

presented by this petition. *Ferebe* requires courts to measure timeliness on the basis of the scheduled trial date. Often, however, there are disputes over whether a trial date was actually scheduled and, if so, what the date was. In *Ferebe* itself, for example, the Fourth Circuit had to remand to the district court to determine whether a trial date was scheduled when the death notice was filed. 332 F.3d at 738-740. Although a date had previously been set, the trial judge at points had suggested that intervening developments may have "had the *practical* effect of cancelling the * * * trial date" before the death notice was filed. *Id.* at 738. On remand, the district court decided the issue only after a lengthy analysis of its scheduling procedures. 2005 WL 1429261, at *5-7. The same uncertainty has infected many other cases. See, *e.g.*, *Cuong Gia Le*, 311 F. Supp. 2d at 532-533 & n.12 (addressing "complicating factor" that arose from the court's having cancelled the scheduled trial date for multiple reasons, some but not all of which were related to the government's imminent filing of a death notice); *Ponder*, 347 F. Supp. 2d at 267 (addressing whether a scheduled trial date exists where a date is nominally set but "the court knows, and the parties are reasonably aware, that the matter is not actually proceeding to trial on that date").

No such complexities exist here. It is clear from the record that a firmly scheduled trial date—April 18, 2005—existed when the death notice was filed. The district court scheduled that date on October 28, 2004, stating that "the case will go to trial on the date that the Court assigns, absent good cause being shown." App., *infra*, 7a; 10/28/04 Tr. at 4. At the January 28 conference, the court "confirmed that the trial was set for April 18, 2005." App., *infra*, 9a. At a February 10 conference, the magistrate judge described that date as "firm and fast approaching." *Id.* at 10a. And at the March 30 status conference, *after* the death notice was filed, the district court *still* maintained that April 18 was the scheduled trial date. See 3/30/05 Tr. at 7

(describing "the week of April 11th" as "the week prior to trial"). The parties now dispute the *significance* of that scheduled trial date, but there is no dispute that a scheduled trial date *existed*.

The procedural posture of this case is likewise ideal. Although this Court often prefers to review final judgments, this case's interlocutory posture weighs *in favor* of granting the petition here. First, the very reasons that made interlocutory review appropriate in the court of appeals under the collateral order doctrine also make interlocutory review appropriate here. The collateral order doctrine applies where, among other things, a party's right "would be 'lost, probably irreparably,' if review had to await final judgment." *Abney* v. *United States*, 431 U.S. 651, 658 (1977). In *Ferebe*, the Fourth Circuit held that orders denying a motion to strike a death notice satisfy that condition because, if wrongly decided, they "irreparably deprive capital defendants of an important right"—"the right not to stand trial for one's life" absent the statutorily required notice. 332 F.3d at 728-730. The court below reached that same conclusion. See App., *infra*, 21a. That prospect of irreparable harm also justifies immediate review by this Court. See Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18, at 259 (8th ed. 2002) (interlocutory review warranted where ruling poses "immediate consequences for the petitioner").[10]

The court below also found the collateral order doctrine applicable because "'to conduct a capital trial only to strike the death-penalty notice afterwards would be a colossal waste of time, effort and expense for both litigants and the courts.'" App., *infra*, 21a n.17 (quoting *McGriff*, 427 F.

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[10] Because Wilk's trial is not scheduled to begin until April 2007, there is no danger of this case becoming moot while the Court considers this petition. Of course, if this Court grants the petition, it may become appropriate for the district court or this Court to stay the trial.

Supp. 2d at 257). Those same considerations also apply here. This Court often grants interlocutory review where a prompt decision could determine the course of future proceedings, and further development of the record will not assist the Court's review. See Stern, *supra*, § 4.18, at 259 ("[W]here * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status * * * .").[11] Here, this Court's decision could determine whether there will be further capital proceedings of any sort.[12]

Most important, the interlocutory posture of this case would present an additional issue for the Court's resolution: whether the district court's denial of Wilk's motion to strike was properly appealable under the collateral order doctrine.

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[11] The Solicitor General often recommends that the Court grant petitions seeking review of interlocutory decisions for these or similar reasons, and this Court often grants those petitions. See, *e.g.*, Gov't Br., *Osborn* v. *Haley*, No. 05-593, 2006 WL 403906, at *10 (Feb. 17, 2006) (review warranted "on balance" despite interlocutory posture); U.S. Br. as Amicus Curiae, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, No. 92-854, 1992 WL 12006433, at *17-18 (May 12, 1992) (review warranted despite interlocutory posture because "[t]he issue of law presented in this case is not likely to be sharpened by factual elaboration at trial"); U.S. Br. as Amicus Curiae, *Air Line Pilots Ass'n Int'l* v. *O'Neill*, No. 89-1493, 1990 WL 10012690, at *17 n.23 (Aug. 14, 1990) (review warranted despite interlocutory posture because "the court of appeals has finally determined the applicable legal standard").

[12] This case's interlocutory posture also avoids potential impediments to review that could arise if the Court were to confront the issue following a death sentence. For example, the Federal Death Penalty Act provides that courts "shall not reverse or vacate a sentence of death * * * where the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. § 3595(c)(2). In cases raising this issue after trial, that harmless-error standard may impede the Court's ability to resolve the issue presented here.

That additional issue weighs strongly in favor of granting the petition because it too is an important question of federal law on which the circuits are divided. Although most courts have concluded that such orders are immediately appealable, see App., *infra*, 20a-21a; *Ferebe*, 332 F.3d at 726-730; *Breeden*, 366 F.3d at 372-373; cf. *Ayala-Lopez*, 457 F.3d at 108, the Second Circuit recently reached the opposite conclusion, dismissing an interlocutory appeal from an order denying a motion to strike a death notice "for lack of appellate jurisdiction." *United States* v. *Robinson (McGriff)*, No. 06-2014-cr (2d Cir. Sept. 21, 2006).[13] If the Second Circuit is correct and federal courts have been consistently exceeding their jurisdiction (as the government has repeatedly argued, see, *e.g.*, Gov't C.A. Br. 25-29), this Court should correct that misunderstanding—particularly because interlocutory appeals can cause substantial delays in death-penalty cases. And *that* issue—whether courts of appeals have jurisdiction over interlocutory appeals challenging the timeliness of a death notice—can *only* be addressed in an interlocutory case such as this one.[14]

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[13] The Second Circuit issued an order dismissing the appeal, and stated that "[a]n opinion will follow." *McGriff*, No. 06-2014-cr (2d Cir. Sept. 21, 2006). The court has not yet issued that opinion.

[14] This issue is not set forth as a separate question presented because Wilk was not aggrieved by the jurisdictional ruling below. If the Court grants the petition, it may wish to consider directing the parties to brief whether a district court's denial of a motion to strike a death notice is immediately appealable under the collateral order doctrine. The Court has followed a similar course in the past, directing parties to brief some threshold issue in addition to the question presented—even where, unlike here, the threshold issue was not independently worthy of this Court's review. See, *e.g.*, *Moylan* v. *Camacho*, No. 06-116, 2006 WL 2066649 (cert. granted Sept. 26, 2006); *Osborn* v. *Haley*, 126 S. Ct. 2017 (cert. granted May 15, 2006); *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 36 (cert. granted Sept. 27, 2005).

III. THE DECISION BELOW IS INCORRECT

The decision below is also incorrect. As the Fourth Circuit recognized in *Ferebe*, § 3593(a) is most naturally read to measure timeliness on the basis of the scheduled trial date when the death notice is filed, not the date when the case later happens to proceed to trial. The statute commands the government to take an action at a particular time: "[T]he attorney for the government * * * shall, a reasonable time before the trial * * * , sign and file with the court" a death notice. 18 U.S.C. § 3593(a). At the time the government is supposed to act, the *actual* trial date is not yet known; only the *scheduled* trial date is known. When Congress directs a party to take an action at a particular time, it is fair to assume that Congress intends that time to be ascertainable *at that time*, not determinable only after the fact with the benefit of hindsight. Cf. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (reasonableness judged without "the 20/20 vision of hindsight"); *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984) (reasonableness assessed without "the distorting effects of hindsight"). The most natural interpretation of the statute, therefore, is that "a reasonable time before the trial" refers to the only trial date known when the government takes the action the statute directs—the "set trial date at the moment the Death Notice was filed." *Ferebe*, 332 F.3d at 739.

The Eleventh Circuit thought the statutory text supported its position because § 3593(a) refers to the period of time remaining "'before the trial,'" not "'before the date of trial.'" App., *infra*, 25a. But that reads far too much into Congress's use of the unadorned word "trial." Although the statute does not *expressly* refer to the "scheduled trial date," that meaning is implicit from the statute's structure. The *scheduled* trial date is the only one known when the government takes the action the statute directs. The *ultimate* trial date, by contrast, remains subject to the vagaries of scheduling until the day trial begins. Congress could not

have intended to keep the parties guessing about the timeliness of a death notice until the very eve of trial.

The inadequacy of the Eleventh Circuit's textual argument is apparent from the fact that August 29, 2005, was no more the *actual* trial date than April 18 was—trial in this case *still* has not begun. In truth, the Eleventh Circuit was not choosing between an actual trial date and a scheduled one, but between two different scheduled dates. The court's textual argument provides no basis for preferring one scheduled trial date over the other.

The Eleventh Circuit also stated that any prejudice to the defendant could be avoided by granting a continuance after the death notice was filed. App., *infra*, 26a-28a & n.28. But that assumes that the mere absence of prejudice to a party's opponent is an adequate excuse for noncompliance with a statutory deadline. It is not. See *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) ("Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."). As *Ferebe* makes clear, § 3593(a) establishes a *prophylactic* right not to be tried for a capital offense absent the statutorily required notice. 332 F.3d at 731. Mere absence of prejudice from the government's failure to comply with § 3593(a) does not excuse noncompliance.

Courts routinely apply that principle when a *defendant* misses a deadline. If Wilk were convicted and missed the one-year statute of limitations for his federal habeas petition, for example, he would not be entitled to a retroactive extension merely upon proof—however clear—that his tardiness caused no prejudice to the government. He would have to show that he was diligent but that some "extraordinary circumstance stood in his way." *Pace* v. *DiGugli-*

elmo, 544 U.S. 408, 418 (2005).[15] The government could not come close to meeting that standard here.[16]

The Eleventh Circuit's reading of § 3593(a) essentially transforms a notice obligation imposed on the government into a scheduling obligation imposed on the district court. Congress could have written the statute that way—it could have required courts to schedule trial "a reasonable time *after* the death notice is filed." But it did not. Instead, Congress put the burden on the government to file its death notice "a reasonable time *before* the trial." The statute imposes a procedural obligation on the government, and the government's failure to satisfy that obligation should be treated no more favorably than any other litigant's.

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[15] Mere absence of prejudice does not excuse noncompliance in a host of other contexts as well. For example, Federal Rules of Criminal Procedure 12.1, 12.2, and 12.3—which require defendants to disclose alibi witnesses, insanity defenses, or public-authority defenses at specified times before trial—do not categorically excuse noncompliance upon a mere showing of absence of prejudice. Rather, the rules require "cause" for the failure to comply. See Fed. R. Crim. P. 12.1(e) & advisory committee note (requiring "cause shown for the failure to conform"); Fed. R. Crim. P. 12.2(a), (b) (requiring "good cause"); Fed. R. Crim. P. 12.3(c); cf. *Taylor* v. *Illinois*, 484 U.S. 400, 416-417 (1988) (upholding exclusion of witness despite absence of prejudice where defendant acted in bad faith).

[16] The government has never adequately justified its failure to file earlier. It claimed that it was waiting for the new Attorney General to be confirmed, App., *infra*, 8a, but the Deputy Attorney General is authorized to act in his absence, U.S. Attorneys' Manual § 9-10.020. The Eleventh Circuit refused to conduct any inquiry into the government's diligence. App., *infra*, 26a n.26. It observed that "there is no allegation in this case that the government actually made a decision but then in bad faith intentionally delayed advising Wilk of its decision in order to shorten Wilk's preparation time." *Ibid.* But mere absence of bad faith in *informing* Wilk of the government's decision is hardly the same thing as *diligence* in *reaching* that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM D. MATTHEWMAN
SEIDEN, ADLER & MATTHEWMAN
2300 Glades Rd.
West Tower—Ste. 340
Boca Raton, FL 33341
(561) 416-0170

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

J. RAFAEL RODRIGUEZ
LAW OFFICES OF J. RAFAEL RODRIGUEZ
6367 Bird Rd.
Miami, FL 33155
(305) 667-4445

Counsel for Petitioner

NOVEMBER 2006

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12694

D.C. Docket No. 04-60216-CR-JIC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH WILK A.K.A. KENNETH P. WILK
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(JUNE 20, 2006)

Before DUBINA and HULL, Circuit Judges, and RESTANI*, Judge.

HULL, Circuit Judge:

Appellant Kenneth Wilk ("Wilk") appeals the district court's denial of his motion to strike the government's Notice of Intent to Seek the Death Penalty (the "Death Notice") and to bar the government from seeking the death penalty in his trial for the murder of Deputy Sheriff Todd M. Fatta ("Fatta") and other charges. Wilk asserts that the Death Notice was not provided to him "a reasonable time

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

before the trial" as required by 18 U.S.C. § 3593(a). After review and oral argument, we affirm, concluding that a Death Notice filed six months before the trial is reasonable notice under § 3593(a).

I. BACKGROUND

A. Fatta's Murder

In the summer of 2001, Wilk's domestic partner, Kelly Ray Jones ("Jones"), was arrested and convicted on child pornography charges. Jones was sentenced to twenty-eight months' imprisonment and three years of supervised release. A condition of Jones's supervised release was that he not use the Internet. During Jones's prosecution, Wilk made threats to law enforcement personnel, some of which he made online under his computer screen name "Wolfpackeines." Wilk's online profile listed hobbies such as "hunting cops" and occupations such as "cop bashing" and "alerting people about kiddy porn stings." Around this time, Wilk purchased several firearms and participated in firearm skill shooting contests throughout Florida. Wilk purchased additional firearms in 2002 and 2003, including a Winchester 30-30 rifle.

On July 12, 2004, while on supervised release, Jones sent images depicting child pornography to an undercover law enforcement officer from Wilk's Internet account on a computer at a residence shared by Jones and Wilk. On July 15, 2004, as a result of further investigation, police obtained a search warrant, searched the residence, recovered numerous child pornography images, and arrested Jones on the scene.

While Jones was incarcerated, he instructed Wilk to contact a witness whom the police told Jones not to contact. Wilk went to the witness's apartment and told him that, even if the witness cooperated, the witness would still have to serve prison time. At Jones's direction, Wilk sent derogatory emails to the witness's business associate in an at-

tempt to discredit the witness. Further communication between Jones and Wilk suggested that Wilk planned to threaten or kill a witness against Jones. Also at Jones's instruction, Wilk deleted emails relevant to Jones's child pornography charges.

Following these events, federal agents obtained an arrest warrant for Wilk and a search warrant for his residence. Agents initially planned to use a ruse to lure Wilk from the residence, but abandoned the idea after learning that Wilk anticipated such a tactic. On August 19, 2004, Fatta and Sergeant Angelo Cedeno ("Cedeno"), both of the Broward County Sheriff's Office, assisted federal agents, including Immigration and Customs Enforcement Special Agent Christopher Harvey, in the execution of the warrants. After surrounding the residence and announcing themselves, the officers forcibly entered.

Upon entry, two large caliber gunshots were heard, followed by several smaller caliber gunshots. At that point, Cedeno was injured from the shooting, and Wilk appeared at the open front door. Wilk complied with officers' demands to surrender and was arrested. A gun was found in the front doorway from which Wilk exited the residence. Inside the residence, Fatta was found shot on the floor and did not appear to be breathing. Despite attempts to revive him, Fatta subsequently died. Other than Wilk, no one else was found in the residence.

The next day, on August 20, 2004, the district court appointed J. Rafael Rodriguez, who has extensive experience in capital crimes litigation, to represent Wilk. On August 26, 2004, Wilk and Jones were indicted jointly in a five-count indictment that charged them with child pornography and witness and evidence tampering offenses.[1] On Septem-

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[1] Counts 1, 2, and 5 charged Wilk and Jones with conspiracy to possess child pornography, possession of child pornography, and witness and evidence tampering, respectively. Counts 3 and 4 were

ber 1, 2004, Wilk was arraigned on this initial indictment, and on September 2, 2004, the district court set a trial date of November 1, 2004, on the five-count indictment. As detailed below, the capital murder charges in this case were added later.

On September 22, 2004, Wilk made a presentation to the United States Attorney's Office in Florida regarding the propriety of capital punishment in this case in connection with Fatta's murder.[2] A meeting on the matter with the Capital Case Unit of the Justice Department was scheduled for October 18, 2004, in Washington, D.C.[3]

B. October Status Conferences

From the start, this case was considered a potential death penalty case. At a status conference on October 8, 2004, the government stated that it might seek the death

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against Jones alone and charged him with two counts of distribution of child pornography.

[2] The Attorney General must authorize any federal death penalty prosecution. U.S. Attorneys' Manual § 9-10.020. "In any case in which a United States Attorney's Office is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration." *Id.* § 9-10.030. After the U.S. Attorney decides to seek authorization for the death penalty, he must submit a Death Penalty Evaluation form and a prosecution memorandum to the Department of Justice in Washington, D.C., which is processed by the Capital Case Unit. *Id.* § 9-10.030-.040. Defense counsel is also provided the opportunity to present facts to the Capital Case Unit when the Unit considers whether to authorize the death penalty in the case. *Id.* § 9-10.050. The Attorney General then makes the final decision authorizing the U.S. Attorney to seek the death penalty. *Id.*

[3] The meeting was rescheduled for November 1 and later postponed until December 13. Defense counsel made presentations in Florida and Washington, D.C. arguing, among other things, that the government should not seek the death penalty against Wilk because he had a disease and was dying in any event.

penalty in a forthcoming superseding indictment. The magistrate judge suggested that a continuance of the November 1 trial date was probably necessary. On October 15, 2004, Wilk moved to continue the November 1 trial, citing outstanding discovery issues and the possibility that Wilk would be charged with a capital offense. On October 20, 2004, the district court granted Wilk's motion and continued the trial until December 13, 2004.

Also on October 20, 2004, and on the ex parte request of Wilk's counsel, the magistrate judge appointed William Matthewman, who is qualified to handle death penalty cases, as Wilk's second counsel pursuant to 18 U.S.C. § 3005 and due to the probability of this becoming a capital case. Additionally, the district court granted funds for an investigative firm and mitigation specialist so that Wilk could prepare for a death penalty trial.[4]

On October 21, 2004, the grand jury returned a six-count superseding indictment against only Wilk charging him with the same possession of child pornography and witness and evidence tampering offenses in the prior indictment and adding counts for: (1) the malice murder of Fatta, while he was assisting a federal officer engaged in official duties, designated as a capital count; (2) the attempted murder of Cedeno; (3) the use of a firearm during the murder and attempted murder, designated as a capital count; and (4) obstruction of justice in connection with Jones's prosecution.[5] The superseding indictment also referenced 18 U.S.C. §§ 3591(a)(2)(A)-(D) and 3592(c), which set out the statutory aggravating factors required to impose the death penalty, and then listed the charged

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[4] Because various ex parte motions remain under seal, we do not identify the names of the persons or the tasks Wilk sought funds to have performed.

[5] The superseding indictment omitted the conspiracy to possess child pornography count charged in the first indictment.

statutory aggravating factors in this case as: (1) Wilk was over the age of eighteen; (2) Wilk intentionally killed Fatta; (3) Wilk knowingly created a grave risk of death to one or more persons in addition to Fatta; (4) Wilk committed the murder after substantial planning and premeditation; and (5) Wilk intentionally killed or attempted to kill more than one person in a single criminal episode. On October 28, 2004, Wilk was arraigned on the superseding indictment.

C. October 28, 2004, Conferences

At an October 28 status conference before the district court, Wilk requested a continuance of the December 13 trial and waived his right to a speedy trial.[6] Wilk stated that a continuance was necessary due to outstanding discovery issues and a December 13 meeting with the Department of Justice Capital Case Unit regarding whether the government would seek the death penalty.

The government opined that the case was not complicated, but acknowledged that Wilk's mental status was a potentially complicating matter. The government suggested a May trial date because it believed that discovery would have been complete by then and a decision would have been made about seeking the death penalty. The government estimated that it would deliver its discovery materials to the defense by the following week.

Wilk outlined the outstanding discovery issues, including access to Wilk's residence, review of conversations between Wilk and Jones, and review of police reports and 911 recordings. Wilk also expressed his need to procure experts for the guilt and penalty phases and to allow them time to analyze the evidence. Wilk then expressed his frustration with the fact that he did not have access to his residence for investigative purposes and noted that he was currently preparing for the upcoming meeting with the Department of

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[6] It is not clear whether Wilk waived his speedy trial rights under the initial indictment or the superseding indictment.

Justice regarding the death penalty in this case. Wilk opined that the defense could not be ready by May 2005 due to its need to prepare, especially if the government opted to seek the death penalty.

The district court reset the trial date from December 13, 2004, to April 18, 2005. Wilk objected to the April 18 trial date, believing that there was no "way we can be ready for a potential death penalty case by that time." The district court overruled the objection, noting that Wilk's two counsels were qualified and experienced with trying capital cases, that an April 18 trial was over five months away, and that the case was not complex.

At a separate status conference on October 28, 2004, the magistrate judge addressed discovery deadlines. Wilk again expressed his dissatisfaction with the April 18 trial date, indicating that counsel would not be ready for trial by that time. Wilk's counsel expressly stressed that the case was a "potential capital case[.]"

D. November and December Conferences

At a November 12, 2004, status hearing, the magistrate judge addressed the status of discovery. The government stated that its discovery material was available for Wilk at the copiers, but additional materials, such as DVDs and CDs containing evidence, were still being prepared. The parties then discussed who would pay for the duplication costs. That same day, Wilk filed ex parte motions for four defense experts. The magistrate judge granted funding for the experts on December 28.

At a December 2, 2004, status conference, the government stated that the discovery issues were proceeding properly and that it had sent a second set of materials to the copiers. Wilk noted that a motion to compel some additional discovery materials from the government may be necessary depending on what was already at the copiers. Wilk's counsel noted that the case was a "potential capital

case" and expressed the "need to prepare, not only for the [December 13] DOJ meeting, but also for [the April 18] trial and any death penalty issues." Also on December 2, Wilk filed an ex parte motion for a fifth expert, which the magistrate judge granted on January 31, 2005. On December 21, Wilk filed ex parte motions for his sixth and seventh experts, which the magistrate judge granted on January 31, 2005.

E. January Conferences

At a January 5, 2005, status conference, the parties addressed a dispute regarding access to Wilk's house and the collection of physical evidence there. Wilk wanted to remove certain items from the residence to prepare for trial, but the government opposed the removal without a formal accounting of the items. Also on January 5, Wilk filed an ex parte motion for additional investigative fees for travel to interview relevant witnesses in preparation for the penalty phase. Additionally, he filed a motion for his eighth expert. The magistrate judge granted the motions on February 4 and 24, respectively.

On January 28, 2005, the district court held another status conference. The government stated that it had made a presentation in December in Washington, D.C., regarding the death penalty in Wilk's case, but that the Attorney General would not make a decision until February 25 because the new Attorney General had not been confirmed yet. The district court noted that a Death Notice must be filed a reasonable time before trial.

In this regard, 18 U.S.C. § 3593(a) provides that in a capital case the government shall, "a reasonable time before the trial," file with the district court and serve on the defendant notice that the death penalty is justified and list the aggravating factors justifying a death sentence. During the status conference, the government contended that filing a Death Notice as late as February 25, 2005, for the April 18

trial was "a reasonable time before the trial" under § 3593(a) because (1) Wilk already had a second defense counsel appointed in October 2004 in anticipation of the death penalty, and (2) the district court already had conducted ex parte hearings regarding Wilk's retention of experts and mitigating aspects relating to the death penalty.

Wilk explained that, assuming the Death Notice was filed on February 25, defense counsel still would not be ready for a capital case by April 18 and the notice would not be reasonable under § 3593(a). Wilk argued that the fact that two lawyers had been appointed was not relevant and that a reasonable time for filing the notice was six months before trial. The district court stated that "it would probably behoove the defendant to assume that the government will be seeking the death penalty."

Given that the statutory aggravating factors were already listed in the October 21 superseding indictment, the government also agreed to provide Wilk with a list of non-statutory aggravating factors for seeking the death penalty within ten days so that Wilk would not be hampered in the preparation of his defense should the Attorney General authorize the death penalty.[7] Wilk objected to the procedure, arguing that a February Death Notice could not be reasonable with respect to an April trial date. When the district court inquired how Wilk would be prejudiced if he already was apprised of the statutory and non-statutory aggravating factors, Wilk responded that prejudice was irrelevant as § 3593(a) required strict compliance.

At the January 28, 2005, conference, the district court confirmed that the trial was set for April 18, 2005, and ordered the government to file a Death Notice by February 18, which would provide the Attorney General sufficient time to review the case. The parties then extensively discussed the

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[7] The government provided the non-statutory aggravating factors to the defense via letter on February 4, 2005.

jury questionnaire, which, over Wilk's objection, included questions regarding capital punishment.

F. February Conferences

On February 2, 2005, Wilk filed an ex parte motion for his ninth expert, which the magistrate judge granted on March 9, 2005. On February 4, Wilk filed another ex parte motion for additional funds for the mitigation specialist and investigative firm already working on the penalty phase. The magistrate judge granted the motion on March 9.

At a February 10, 2005, status conference, the government acknowledged the February 18 deadline to file the Death Notice and explained that the Attorney General was still reviewing the case. Wilk stated that he would file most of his motions by the February 14 motions deadline, but requested additional time for some motions in light of the February 18 Death Notice deadline. Wilk's counsel stated that "as of now the case is not a capital case" and advised the magistrate judge that "a whole new range of motions and a whole new range of issues" would arise should the government file a Death Notice. The government responded that it had intended to seek approval for the death penalty from the beginning of the case. The magistrate judge explained that Wilk should treat the case as a death penalty case and indicated that the April 18 trial date was firm and fast approaching. The magistrate judge also expressed reservations about extending the motions deadline, but allowed Wilk until February 16 to file his motions.

On February 16, 2005, Wilk's two counsels filed these thirty-nine motions: (1) thirteen motions to dismiss various counts of the superseding indictment on grounds such as failure to state a crime, unconstitutionality of the underlying criminal statute, duplicity and multiplicity, lack of jurisdiction, vagueness, governmental delay, and insufficient commerce clause nexus; (2) a motion for production of legal instructions provided to the grand jury; (3) a motion

for a pretrial hearing to determine the existence of a conspiracy, the admissibility of alleged conspiratorial statements, and to exclude alleged co-conspirator hearsay; (4) a motion to bifurcate the forfeiture count; (5) a motion for early Jencks Act disclosure; (6) a Federal Rule of Criminal Procedure 12(b)(4)(B) motion for notice by the government of its intention to use evidence in its case-in-chief; (7) a motion for change of venue based on prejudicial pretrial publicity; (8) two motions for a bill of particulars, one each on the obstruction of justice and child pornography counts; (9) a motion to strike the statutory aggravating factors from the superseding indictment; (10) a motion to strike "surplusage" from the superseding indictment; (11) a motion to sever the counts; (12) a motion to suppress the phone calls between Wilk and Jones; (13) nine motions in limine regarding pretrial lineups, bankruptcy cases, 911 and fire rescue tapes, conversations between Wilk and Jones, past searches and seizures at Wilk's residence, Jones's guilty plea, Wilk's "perp walk" and mug shots, and other crimes evidence; (14) a motion to exclude the government's expert witnesses; (15) a motion to suppress fruits of the search warrant executed on August 19, 2004; (16) a motion to suppress Wilk's medical and psychiatric records; (17) a motion to suppress Wilk's post-arrest statements; and (18) a motion to compel discovery.

On February 18, 2005, the government filed a formal Death Notice based on the malice murder of Fatta and the use of a firearm resulting in Fatta's death.[8] The statutory aggravating factors listed in the Death Notice were identical to those listed in the superseding indictment filed on October 21, 2004. The Death Notice also listed the follow-

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[8] Although the notice was postmarked February 22, 2005, defense counsel did not receive a copy until February 24, 2005. The government explained the disparity as a result of the Presidents' Day holiday. Wilk was never personally served with a copy of the notice.

ing non-statutory aggravating factors under 18 U.S.C. § 3593(a)(2): (1) Wilk killed Fatta in an attempt to obstruct justice; (2) Wilk may be convicted contemporaneously of charges in addition to the capital charges; (3) Wilk was a danger to others; and (4) Wilk caused injury and harm to Fatta's family by killing Fatta.[9]

At a February 24, 2005, status conference, the magistrate judge scheduled hearings commencing on February 28 primarily for Wilk's suppression motions and noted that she would hear oral argument on all the motions if Wilk desired. The government expressed its intent to file a second superseding indictment to add an additional capital count relating to Fatta's murder. Wilk's defense counsel stated they had a "slew of additional motions" to file regarding the Death Notice. The magistrate judge responded that she had previously warned the defense to treat the case as a capital case and to file all motions accordingly, but nevertheless allowed additional motions to be filed by March 11. The magistrate judge heard motions arguments on February 28, March 2, and March 9.

G. March Motions

On March 8, 2005, Wilk filed a motion to strike the Death Notice filed on February 18. On March 10, 2005, the government filed a seven-count second superseding indictment, which retained the six counts from the first superseding indictment and added a third capital count charging Wilk with the murder of Fatta, a state law enforcement officer, while Fatta was working with a federal officer in furtherance of a federal investigation. The statutory aggravating factors listed in the second superseding

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[9] We could not locate in the record the letter, referenced at the January 28, 2005, status conference, listing the non-statutory aggravating factors, and, thus, we do not know if Wilk had already been advised of these factors. *See supra* note 6.

indictment were identical to those listed in the Death Notice and the first superseding indictment.[10]

On March 9, 2005, Wilk filed an ex parte motion for his tenth expert. The magistrate judge granted the motion on April 20.

On March 11, 2005, Wilk filed three separate motions to declare the Federal Death Penalty Act unconstitutional, *inter alia*, (1) because of its unconstitutional use, authorization, and treatment of aggravating factors and its failure to provide a standard for jurors to employ in balancing aggravating and mitigating factors; and (2) in light of *Ring*,[11] *Crawford*,[12] and *Booker*.[13]

Also on March 11, Wilk filed a motion to extend the time for filing motions, arguing, among other things, that the government had filed only partial expert witness disclosures, the government had not provided all discovery, and the defense had not had time to review the second superseding indictment. The magistrate judge granted Wilk's motion and extended the motions deadline to March 18. Following Wilk's motion for reconsideration of the motions deadline, the district court extended the deadline to March 30.

On March 15, 2005, Wilk filed an ex parte motion for his eleventh expert, which the district court granted, in an abundance of caution, on April 20, 2005, over the magistrate judge's denial.

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[10] Neither the first nor the second superseding indictment included the non-statutory aggravating factors, but the Death Notice did include them.

[11] *Ring* v. *Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L. Ed. 2d 556 (2002).

[12] *Crawford* v. *Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004).

[13] *United States* v. *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005).

Also on March 15, the government moved for leave to file an amended Death Notice to include the additional capital murder count contained in the second superseding indictment. The statutory and non-statutory aggravating factors listed in the proposed amended Death Notice were identical to those found in the initial Death Notice. The district court granted the motion, noting that the amended Death Notice was identical to the prior notice except for the addition of language relating to the new capital murder charge in the second superseding indictment.

On March 25, in addition to a motion to adopt his motions on the first superseding indictment for the second superseding indictment, Wilk filed these motions relating to the second superseding indictment: (1) seven motions to dismiss various counts of the second superseding indictment on grounds such as duplicity, multiplicity, due process and double jeopardy, violation of the Grand Jury clause and other irregularities, failure to state a crime, lack of jurisdiction, and improper delay; (2) a motion to "trifurcate" jury deliberations; (3) a preliminary *Daubert*[14] motion to exclude the government's expert witnesses; and (4) a motion to dismiss the second superseding indictment due to violation of Wilk's speedy trial rights.

On March 31, 2005, Wilk filed a motion to strike the amended Death Notice and a motion for an immediate ruling on that motion.

H. March 30, 2005, Conference

On March 30, 2005, the district court held a status conference to discuss the pending motions. Wilk himself was not present. The district court had received the magistrate judge's reports and recommendations and expected to receive transcripts of the pretrial motions hearings before the magistrate judge by April 11. The district court explained

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[14] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993).

that it would issue orders on the motions "shortly thereafter." The parties discussed evidentiary issues as to their expert witnesses. The government did not believe a hearing on the government's experts was needed, as the experts would testify on non-controversial topics such as ballistics and reconstruction of the crime scene. Wilk disagreed, stating that he had just received the material upon which the government experts relied and needed to provide it to defense experts for review, which would take time. The district court made the week prior to the April 18 trial available for a hearing on the government experts and informed the parties that completed jury questionnaires were available.

The government expressed its concern that it may not be ready for trial on April 18 due to outstanding discovery and expert witness issues. The government opined that it could be ready, but believed that discovery issues still were developing. The government pointed to Wilk's potential mental health defense, noting that it would involve "some pretty intricate and complex expert testimony[,]" and stated that Wilk had not yet disclosed his experts on the matter. In light of Wilk's possible mental health defense, the government anticipated the need to have its own expert examine Wilk, which, under the time frame presently in place, would have to occur while the April 18 trial was proceeding.

The government believed a late summer or fall trial would provide Wilk with sufficient time to prepare. Wilk blamed the government for delay in disclosing various discovery materials; pointed out that he had to seek court approval for his experts, a time-consuming process; asserted that the defense was working as quickly as possible with the April 18 trial date in mind; noted that the guilt and penalty phases of a capital case were inextricably intertwined; and asked the district court "to consider these issues very

carefully before it decides to go forward on the April 18th trial date."

The district court did not believe the government had intentionally delayed discovery or even been dilatory in the least but reluctantly concluded that a continuance was necessary because it was "better to err on the side of delaying the trial and giving the defendant more time in which to prepare the defense." Without waiving any of his arguments, Wilk suggested the day after Labor Day as the new potential trial date. The district court selected August 29, 2005, as the new potential trial date. The government inquired as to whether the additional time would be excludable under the Speedy Trial Act. Wilk's counsel could not respond to the proposed continuance or the exclusion of time for Speedy Trial Act purposes because Wilk was not present, but then opined that the proper procedure was to strike the Death Notice and proceed to trial on April 18. The district court scheduled another status conference for April 1 so that Wilk could be present.

1. April 1, 2005, Conference

At the April 1, 2005, status conference, Wilk stated that he was prepared to go to trial on April 18 if the district court granted his motion to strike the Death Notice. If the district court denied the motion to strike, Wilk would file an interlocutory appeal to this Court and move the district court to stay the proceedings. Wilk conceded that the time during his interlocutory appeal would be excludable under the Speedy Trial Act.

The government believed that Wilk was "extorting" the district court and pointed out that the district court could find time excludable under the Speedy Trial Act in light of Wilk's refusal to take a firm position on the proposed continuance of the trial date to August 29. The government believed that Wilk's new statement that he was prepared for a non-capital trial on April 18 was inconsistent with his

repeated requests for continuances and the outstanding discovery matters.

Wilk responded that different trial strategies would be employed depending on whether the Death Notice was in effect. Wilk asserted that he was not trying to exploit the district court, but wanted a ruling on the Death Notice before he was asked to waive his right to a speedy trial. The district court did not want to rule on Wilk's motion to strike the amended Death Notice until the government had responded.

Ultimately, the district court concluded that both sides needed additional time to prepare for trial, stating:

> [i]t's apparent to the Court based on the argument made by [the government], and based on the numerous submissions by Counsel for the Defense that both sides need additional time to properly prepare this case for trial. I am very stingy, as you know, about granting a continuance but the bottom line is justice.
>
> I am thoroughly convinced that the interest of justice served by a continuance far outweighs any interest of the public and the Defendant in a speedy trial. So as much as I hate to continue this case because, I can tell you it's wrecking [sic] havoc with my schedule, I am going to continue this case until August the 29th.

J. Order Denying Wilk's Motion to Strike the Death Notice

On April 27, 2005, the district court entered a twenty-one page order denying Wilk's motion to strike the Death Notice. The district court analyzed the timeliness of the Death Notice under the factors listed in *United States* v.

Ferebe, 332 F.3d 722, 737 (4th Cir. 2003).[15] *See United States* v. *Wilk*, 366 F. Supp. 2d 1178, 1182-83 (S.D. Fla. 2005). First, the district court concluded that the August 29th trial date should be used in its timeliness analysis because the trial date was continued for reasons unrelated to the filing of the Death Notice. *Id.* at 1183. As reasons for using the August 29 trial date, the district court pointed to the issues raised at the March 30 and April 1 status conferences, including the numerous unresolved motions; the fact that Wilk had not yet disclosed his experts; and the potential for a *Daubert* hearing on the government's experts on April 11, one week before the April 18 trial date. *Id.* at 1183-84.

Second, the district court found that the Death Notice was filed a reasonable amount of time before trial because over six months existed between the filing of the Death Notice and the August 29th trial date. *Id.* at 1185. The district court further determined that even if it were to use the April 18th trial date, the Death Notice was filed "a reasonable time before the trial" because the district court had given the government until February 18 to file the Death Notice and the district court "set this deadline because it found it would provide Defendant notice of the government's intent to seek the death penalty a reasonable amount of time before trial." *Id.*

Third, as to the nature of the charges, the district court found that "[t]he homicide charges are rather basic; only the obstruction of justice and pornography allegations, which form part of Defendant's intent, involve any degree of

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[15] The factors include: "(1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings." *See Ferebe*, 332 F.3d at 737.

intricacy. Thus, two months, let alone six months, would be sufficient time to prepare a defense." *Id.* at 1186. The district court also determined "that the government did not intentionally delay in filing the Death Notice." *Id.*

Fourth, the district court found that "the aggravating factors merely track the [death penalty] statute's language and are reflective of the same facts that are in the homicide charges themselves." *Id.* at 1187. The district court determined that the defendant "could have adequately prepared his death defense in two months, let alone six, given the nature of the aggravating charges and the prior notice provided in the first Superseding Indictment. . . ." *Id.* The district court further concluded that there was nothing to suggest that the government should have filed the Death Notice sooner. *Id.*

Fifth, as to the status of discovery, the district court found "that discovery will undoubtedly be completed long before the August 29 trial date." *Id.* Even with the April 18 trial date, the district court determined that this factor did not weigh in Wilk's favor enough as to outweigh the other factors. It noted that Wilk "had yet to disclose any defense experts or produce any mental health evidence even though [Wilk] had consulted at least a dozen experts." *Id.*

Finally, the district court also relied on the fact that the government included a list of statutory aggravating factors in the first superseding indictment in October 2004, even though it was not required to do so. *Id.* at 1187-88. Because the timeliness of a Death Notice is an issue of first impression in this Court, the district court decided it was also necessary to engage in a prejudice analysis. *Id.* at 1189. The district court found that Wilk did not suffer any prejudice from the timing of the February 2005 Death Notice because: (1) the Death Notice was filed within the deadline imposed by the district court; (2) defense counsel had already received the district court's permission for eleven experts, some of which related solely to penalty

phase issues; (3) the death penalty was addressed at each of the status conferences; (4) the magistrate judge initially informed appointed counsel to treat this as a death penalty case; (5) the district court and the parties had already discussed written juror questionnaires that included questions addressing the death penalty; and (6) the Death Notice merely parroted information that was already known. *Id.* Based on these factors, the district court further found that for "defense counsel to now suggest surprise strikes this Court as being opportunistic and disingenuous." *Id.* The district court denied Wilk's motion to strike the Death Notice. *Id.* at 1190. Wilk timely appealed.

II. DISCUSSION

A. Jurisdiction

We first examine our jurisdiction to hear Wilk's appeal from the district court's order denying his motion to strike the Death Notice.[16] Section 1291 of Title 28 grants us jurisdiction over appeals "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The district court's denial of Wilk's motion to strike is clearly a non-final, interlocutory decision. However, we have jurisdiction to hear appeals from non-final decisions that fall within the "collateral order" doctrine. *See Sell* v. *United States*, 539 U.S. 166, 176, 123 S.Ct. 2174, 2182, 156 L. Ed. 2d 197 (2003); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949). Under the collateral order doctrine, we have jurisdiction over an interlocutory order if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is *effectively* unreviewable on appeal from a final judgment." *Sell*, 539 U.S.

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[16] We review jurisdictional questions, including the appealability of the denial of a pretrial motion to strike a Death Notice, *de novo*. *United States* v. *Cartwright*, 413 F.3d 1295, 1299 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1116, 163 L. Ed. 2d 924 (2006).

at 176, 123 S. Ct. at 2182 (quotation marks and alterations omitted) (emphasis added).

The Fourth Circuit is the only other circuit to consider whether the denial of a motion to strike a § 3593(a) death penalty notice is reviewable under the collateral order doctrine. *See Ferebe*, 332 F.3d at 726-30. In *Ferebe*, the Fourth Circuit concluded that the district court's order denying a motion to strike the government's death notice was reviewable as a collateral order because such orders "are conclusive, collateral to the merits, and if wrongly decided will irreparably deprive capital defendants of an important right [.]"[17] *Id.* at 730; accord *United States* v. *Breeden*, 366 F.3d 369, 372-73 (4th Cir. 2004). We agree with our sister circuit and conclude that we have jurisdiction over Wilk's appeal.[18]

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[17] The Fourth Circuit described the right created in § 3593(a) as the "right not to be convicted and sentenced without adequate time to prepare, but also the right not to stand trial for one's life absent the same[.]" *Ferebe*, 332 F.3d at 730.

We also agree with one court's observation that "there are practical reasons weighing against the post-trial assessment of whether the statute [§ 3593(a)] has been violated; to conduct a capital trial only to strike the death-penalty notice afterwards would be a colossal waste of time, effort and expense for both litigants and the courts." *United States* v. *McGriff*, 427 F. Supp. 2d 253, 257 (E.D. N.Y. 2006).

[18] Our jurisdictional conclusion is also informed by the fact that this case presents an important issue of first impression completely separate from the merits. Furthermore, given that we later conclude that continuances of a trial can cure any issue about whether a particular § 3593(a) notice is untimely, there should be little need for future interlocutory appeals as to a § 3593(a) notice. We may always decline collateral order review where the appeal is clearly frivolous. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1095 (5th Cir. 1977) (noting that an interlocutory appeal must address "'serious and unsettled question(s)' of law . . . that this court has not previously addressed and are particularly appropriate for resolution as a collateral order") (citation omitted); *see also Sell*, 539 U.S. at 176, 123 S. Ct. at 2182 (collateral order "raises questions of clear

B. Objective Reasonableness

The sole issue on appeal is how to apply § 3593(a), which provides that the government shall serve, "a reasonable time before the trial," notice to the defendant stating that the death penalty is justified and listing the aggravating factors. 18 U.S.C. § 3593(a).[19] Section 3593 does not specify what constitutes "a reasonable time before the trial." This case presents an issue of first impression in this circuit as to what is "a reasonable time before the trial" under § 3593(a).[20]

We first conclude that the applicable test is one of objective reasonableness. *See Breeden*, 366 F.3d at 373 (stating that "[a]nalysis of whether the right to reasonable notice

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constitutional importance"); *Cohen*, 337 U.S. at 547, 69 S. Ct. at 1226 (collateral order "presents a serious and unsettled question"); *see generally Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

[19] Section 3593(a) provides, in relevant part:

> If . . . the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—
>
> (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
>
> (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

18 U.S.C. § 3593(a).

[20] The interpretation of a statute, such as § 3593, is a question of law subject to de novo review. *United States* v. *Searcy*, 418 F.3d 1193, 1195 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1107, 163 L. Ed. 2d 918 (2006).

has been violated requires an inquiry into the objective reasonableness of the timing of the notice"); *Ferebe*, 332 F.3d at 731 (stating that courts must conduct "a pretrial inquiry into the objective reasonableness of the notice provided" under 18 U.S.C. § 3593(a)).[21] Further, to determine whether notice was filed an objectively reasonable time before trial, we must consider the totality of the circumstances,[22] including, but not limited to: (1) what transpired in the case before the formal Death Notice was filed; (2) the period of time remaining for trial after the Death Notice was filed; (3) the status of discovery and motions in the proceedings; (4) the nature of the charges in the indictment; (5) the nature of the aggravating factors claimed to support the death penalty; and (6) the anticipated nature of the defense, if known.[23]

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[21] When called upon to determine reasonableness in other contexts, our circuit has used an objective reasonableness standard. *See, e.g.*, *United States* v. *Greer*, 440 F.3d 1267, 1272 (11th Cir. 2006); *Mercado* v. *City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005); *United States* v. *Robinson*, 336 F.3d 1293, 1295 (11th Cir. 2003).

[22] The totality of the circumstances approach is consistent with how we have determined reasonableness in a variety of other contexts in criminal cases. *See, e.g.*, *Padgett* v. *Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005); *Conklin* v. *Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004); *Hubbard* v. *Haley*, 317 F.3d 1245, 1252-53 (11th Cir. 2003); *United States* v. *Hunter*, 291 F.3d 1302, 1306-07 (11th Cir. 2002); *United States* v. *Brundidge*, 170 F.3d 1350, 1352-53 (11th Cir. 1999); *Blanco* v. *Singletary*, 943 F.2d 1477, 1508 (11th Cir. 1991); *United States* v. *Tobin*, 923 F.2d 1506, 1519 (11th Cir. 1991).

[23] We recognize that the Fourth Circuit generally adhered to four articulated factors in evaluating the reasonable timeliness of a Death Notice. *See Ferebe*, 332 F.3d at 737; *Breeden*, 366 F.3d at 374. However, the Fourth Circuit also described those four factors as "among other factors that may appear relevant[.]" *Ferebe*, 332 F.3d at 737. Our conclusion that evaluating objective reasonableness requires an unrestricted evaluation of all the circumstances is thus not inconsistent with the Fourth Circuit's approach.

Having spared no expense in the factual and procedural history discussion above, we can now readily undertake the analysis of whether the government gave reasonable notice before the trial. As to the first factor, the events described above demonstrate that, from the start, all parties knew this was a likely death penalty case, and thus, Wilk's counsel, who had extensive capital crimes experience, began to prepare a death defense months before the Death Notice was filed on February 18, 2005. For example, as early as September 16, 2004, he requested ex parte funds for investigation and mitigation experts related to the death penalty and made an ex parte request for a second death-qualified counsel under 18 U.S.C. § 3005.[24] Wilk's counsel also moved to continue the trial, originally calendared for November 1, 2004, due to, among other things, the probability that Wilk would be subject to the death penalty. Then, on October 28, 2004, Wilk's counsel requested a continuance of the December 13, 2004, trial due to discovery issues and a December 13 meeting with the Department of Justice regarding the death penalty.

Additionally, from November 2004 to January 2005, Wilk requested and was granted funding for eight more experts, some of whom related solely to preparation for the penalty phase. At the January 5, 2005, status conference, the parties discussed a jury questionnaire containing questions on capital punishment. The statutory aggravating factors listed in the February 18, 2005, Death Notice had already been disclosed in the October 21, 2004, superseding indictment. In short, before the formal February 18 Death No-

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[24] "Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours." 18 U.S.C. § 3005.

tice, Wilk's counsel undertook significant preparation for a death defense.

As to the second factor, the time interval between the Death Notice and the trial was six months from February 18 to August 29 and was clearly adequate to prepare a death defense in this case. The government's Death Notice was objectively reasonable notice on this basis alone.[25]

We reject Wilk's argument that April 18, the scheduled trial date at the time the original Death Notice was filed, is the outer limit and that the relevant interval is only two months from February 18 to April 18. Wilk ignores the fact that § 3593(a) states that the Death Notice must be filed "a reasonable time before the *trial*," not a reasonable time before the date the trial was scheduled to begin when the Death Notice was formally filed. *See* 18 U.S.C. § 3593(a) (emphasis added). Section 3593(a) does not state "before the date of trial," but rather states "before the trial . . . ." *See id.* Simply put, there is nothing in § 3593 that restricts courts to counting only the days between the Death Notice

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[25] Several district courts have applied the objective reasonableness standard and concluded that even less time is reasonable. *Compare United States* v. *Ponder*, 347 F. Supp. 2d 256, 270 (E.D. Va.2004) (notice filed within court-imposed filing deadline and approximately four months before a possible trial date is reasonable), *and United States* v. *Le*, 311 F. Supp. 2d 527, 534-35 (E.D. Va.2004) (113 days' notice is reasonable), *with McGriff*, 427 F. Supp. 2d at 270-72, 2006 WL 979305, at *15-*17 (concluding that twelve days' notice was not objectively reasonable but granting a continuance of the trial date), *United States* v. *Le*, 316 F. Supp. 2d 343, 346, 352-55 (E.D. Va. 2004) (113 days' notice still objectively reasonable, but amended Death Notice, containing different aggravating factors and filed ninety-four days before trial, was not objectively reasonable), *and United States* v. *Hatten*, 276 F. Supp. 2d 574, 579 (S.D. W.Va.2003) (suggesting that thirty-six days' notice is unreasonable).

and a scheduled trial date at the time of the filing of the Death Notice.[26]

Wilk also argues that we should not use the August 29 trial date because the district court continued the April 18 trial date merely to cure the government's untimely Death Notice. We reject this argument for two reasons. First, Wilk's contention is not supported by the record. Rather, the record shows that, at the April 1 status conference, the district court continued the trial date from April 18 to August 29 due to the existence of numerous unresolved motions, the fact that Wilk had not yet disclosed any of his eleven experts to the government, and Wilk's request for a *Daubert* hearing on the government's experts. The district court also emphasized that the government had filed the Death Notice by the February 18 deadline set by the district court and that this Notice was reasonable even if the trial was to be held on April 18. The record supports the government's position that the district court did not continue the trial to cure an untimely notice.

Second, even if the district court continued the trial to August 29, as Wilk argues, wholly or in part to remedy a Death Notice that would otherwise be untimely without a

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[26] A few district courts have examined whether the amount of time the government took to make a decision about whether to pursue the death penalty was reasonable. *See Ponder*, 347 F. Supp. 2d at 263-65; *Hatten*, 276 F. Supp. 2d at 578. We reject that approach as § 3593(a) is designed to protect the defendant from having to stand trial for his life without reasonable notice and time to prepare adequately. The § 3593(a) requirement does not obligate us to examine whether the government's ongoing decisionmaking process took too long. The proper approach is to focus on whether the Death Notice reasonably gave the defendant adequate time before trial to prepare a defense, not whether the government reasonably should have made a decision earlier than it did. In addition, there is no allegation in this case that the government actually made a decision but then in bad faith intentionally delayed advising Wilk of its decision in order to shorten Wilk's preparation time.

continuance or to remove any issue about its timeliness, the district court acted properly.[27] Section 3593 is silent as to the remedy for such a Death Notice. Nonetheless, the obvious purpose of the § 3593(a) notice requirement is to make sure a defendant has adequate time to prepare for a death defense. Continuing the trial after the Death Notice is filed does not undermine but rather preserves the defendant's statutory right not to stand trial for his life without reasonable notice of the government's intent to seek the death penalty. Where a district court determines that the Death Notice was filed at a time when either party, particularly the defense, would reasonably be unprepared for a capital trial on the previously scheduled trial date, a continuance of the trial is appropriate.[28] That a district

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[27] In support of his contention that the district court was motivated by concern over the timing of the Death Notice, Wilk stresses that during the April 1 status conference, the government expressed concern that the defense had filed motions "claiming a lack of notice," and that Wilk had not disclosed his expert witnesses. "If this case is tried at a time in late summer or something of that nature or fall," the government added, "I think the defense would certainly not have the ability to claim that they aren't ready to try this case, that they don't have sufficient notice, of the inability to defend a death penalty matter." Appellant's Brief at 10.

[28] We recognize that the Fourth Circuit analyzed the time interval as "the period of time remaining before trial, measured at the instant the Death Notice was filed." *Ferebe*, 332 F.3d at 737. We do not find persuasive *Ferebe*'s suggestion that a court may not effectively address the concerns raised by a motion to strike a Death Notice as untimely by postponing the trial. *See id.* at 737-38; *cf. id.* at 741 (Niemeyer, J., dissenting) ("[The majority] reads the statute to require a death penalty notice to be given a reasonable time before the *date of trial* . . . not before the *trial*, as the statute provides."). One district court in the Fourth Circuit has read *Ferebe* narrowly and stated that it was not restricted to using the scheduled trial date when the Death Notice was filed "if the court knows, and the parties are reasonably aware, that the matter is not actually proceeding to trial on that date." *Ponder*, 347 F. Supp. 2d at 267.

court continues an earlier scheduled trial date for a murder case after a Death Notice is filed in order to make sure defense counsel has adequate preparation time for a now-required death defense is to be commended even if in the process it cures what might have otherwise been an untimely Death Notice.[29]

Finally, we point out practical reasons why allowing continuances is appropriate. It is routine for trial dates to change in murder cases, and even more so in capital cases, just as it did here. Indeed, the trial date in this case moved twice at Wilk's request: from November 1, 2004, to December 13, 2004, and then to April 18, 2005. When the district court continued the trial from December 13, 2004, to only April 18, 2005, Wilk still objected, stating that he could not be ready even by May 2005 if the government sought the death penalty.[30]

During this same time period, the government conducted a deliberate and full consideration of whether this murder

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[29] Indeed, "[t]he filing of a motion to strike the death notice as untimely is an obvious indication that the defendant needs more time to prepare for trial." *United States* v. *Pepin*, 367 F. Supp. 2d 315, 319 (E.D. N.Y. 2005) (addressing language in 21 U.S.C. § 848(h)(1) identical to § 3593(a)).

We expressly do not reach the issue of whether the Death Notice would have been untimely if the trial date had remained April 18 and not been continued. Rather, even assuming *arguendo* that the Death Notice might have been otherwise problematic without the continuance, we point out that the continuance easily cured any potential problem.

[30] The government argues that Wilk's April 1 statement that he was prepared for a non-capital trial on April 18 is inconsistent with his repeated requests for continuances and the outstanding motions and discovery matters. The government emphasizes that Wilk had more than fifty motions pending and needed a continuance of the April 18 trial even if it was a non-capital trial. We need not address that issue as we do not measure the time interval using the date for which trial was merely scheduled at the time the Death Notice was filed.

case should become a death penalty case, including meeting with Wilk's counsel in September and December 2004 about that issue. That the government's decisionmaking process affords an opportunity for input by the defendant through counsel is a good thing, but it adds to the protracted nature of the decisional process.[31] While that protracted process is ongoing, the district courts, understandably, endeavor to move their murder cases along by setting early trial dates that may be realistic if the government decides not to seek the death penalty, but may become unrealistic when the Death Notice is filed and the case becomes a death penalty case with certainty. A rule that measures the time interval from the date the Death Notice is filed to the scheduled date of trial at the time of that filing unduly restricts the district court's ability to manage its cases and is simply not required by § 3593(a). Allowing continuances after the Death Notice is filed (1) permits the government to receive input from defense counsel and to make the death penalty decision with full and cautious deliberation, while still (2) accomplishing the goal of § 3593(a) to assure that defendants have adequate time to prepare a defense to the death penalty and do not stand trial for their life without reasonable notice. District courts should have the ability to set trial dates to move the case along while it is a more simple murder case but then continue the trial date if and after a Death Notice is actually filed.

Our determination that the continuance was proper and the time interval between the Death Notice and the trial was six months allows us to dispense quickly with the third, fourth, and fifth factors. As to the third factor, six months

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[31] One court has noted that "credible statistics disclose that the average interval between death-penalty eligibility and the filing of a death-penalty notice is approximately eight months." *McGriff*, 427 F. Supp. 2d at 257 (citing statistics derived from raw data compiled by the Capital Defense Network). The time here was six months.

was not only an objectively reasonable notice to complete the remaining discovery and motions, it was more than enough time. Wilk stresses the fourth factor—the nature of the charges in the indictment—and that the nineteen-page second superseding indictment contains seven counts, spans a broad period of time (nearly four years), involves serious and lengthy allegations, and identifies evidence (particular computer evidence) requiring expert access and review. The indictment also contains an obstruction of justice count involving judicial proceedings almost four years earlier as well as a count of possession of child pornography. Even so, we conclude that, given the six-month preparation period, the third and fourth factors in this case both weigh in favor of the government.

As to the fifth factor, the October 21, 2004, indictment listed the same statutory aggravating factors as did the Death Notice. Further, as noted by the district court, the aggravating factors merely tracked the language of the statute. While the February 18 Death Notice added some non-statutory aggravating factors, those too were straightforward. Thus, the fifth factor does not aid Wilk.

This leaves the nature of the defense. We purposefully have not described the eleven experts for whom the defense obtained funding in ex parte motions before the Death Notice was filed. Given the ex parte nature of the motions, we are also reluctant to describe the nature of the potential defenses revealed therein. We do conclude, however, that six months is clearly more than sufficient time no matter what approach the defense decides to take. Thus, this factor also does not help Wilk.

In sum, considering all the circumstances of the case, we conclude that the government provided objectively reasonable notice of its decision to seek the death penalty and of the aggravating factors claimed to justify the death penalty. Accordingly, the district court properly denied Wilk's motion to strike the Death Notice.

III. CONCLUSION

For the above reasons, we affirm the district court's denial of Wilk's motion to strike the government's Death Notice.[32]

AFFIRMED.

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[32] We also reject Wilk's argument that § 3593(a) requires personal service of the Death Notice. *See* Fed. R. Crim. P. 49(b) ("When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.").

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 04-60216-CR

UNITED STATES OF AMERICA,
Plaintiff,

v.

KENNETH WILK A/K/A "WOLFPACKEINES,"
Defendant.

APRIL 27, 2005

ORDER RE: TIMELINESS OF DEATH NOTICE UNDER 18 U.S.C. § 3593(a)

COHN, District Judge.

THIS CAUSE is before the Court on Defendant, Kenneth Wilk's Motion to Strike Government's "Notice of Intent to Seek the Death Penalty" and For An Order Barring the Government F[ro]m Seeking the Death Penalty, Due to Failure to Provide Reasonable Notice of Intent to Seek the Death Penalty Prior to Trial filed on March 8, 2005 [D.E. # 320] and his subsequent Motion to Strike the Government's Amended Notice of Intent to Seek the Death Penalty filed on March 31, 2005 [D.E. # 438].

The Court has considered the motions, the government's response [DE # 393], Defendant's reply [DE # 420], Defendant's Motion For An Immediate hearing on his "Motion to Strike the Government's Amended Notice of Intent to Seek the Death Penalty" [DE # 443], the record, the applicable law, and is otherwise duly advised in the premises.

In the pending motions, the Defendant challenges the timeliness of the filing of the government's Notice of Intent to Seek the Death Penalty and its Amended Notice. The Defendant alleges that the government's Notice and Amended Notice were not filed a reasonable amount of time before trial as required by 18 U.S.C. § 3593(a), and therefore must be stricken and the government barred from seeking the death penalty.

I. FACTUAL AND PROCEDURAL HISTORY

On August 19, 2004, Broward Sheriff's Deputy Todd M. Fatta was fatally shot while assisting a federal agent in the execution of an arrest and search warrant at the Defendant's residence. On the same day, Defendant Kenneth Wilk was arrested on charges of conspiracy to obstruct justice and conspiracy to possess child pornography. The following day, a federal magistrate appointed attorney J. Rafael Rodriguez, who has extensive experience in capital crimes litigation, to represent the Defendant. On August 26, 2004, Defendant Wilk was indicted in a five-count Indictment that charged him with non-capital offenses [DE # 16], and was arraigned on the Indictment on September 1, 2004. On September 2, 2004, the Court set a trial date of November 1, 2004 [DE # 25].

On September 9, 2004, AUSA John Kastrenakes advised attorney Rodriguez of a meeting scheduled for October 18, 2004 with the Department of Justice, Capital Crimes Unit to review the Wilk case. Prior to this scheduled meeting, on September 22, 2004, Mr. Rodriguez made a presentation to the United States Attorney's Office for the Southern District of Florida regarding the propriety of capital punishment for Defendant Wilk. On October 14, 2004, United States Magistrate Judge Lurana S. Snow, upon the ex parte request of attorney Rodriguez, appointed William Matthewman as second counsel pursuant to Title 18, United States Code § 3005. This was based on Mr. Matthewman's qualifications to handle federal death penalty cases due to the pro-

bability of this becoming a capital case. After his appointment, attorney Matthewman requested postponement of the scheduled October 18, 2004 meeting in Washington, D.C. with the Capital Crimes Unit, which was rescheduled by the government to November 1, 2004.

Subsequently, on October 21, 2004, Wilk was indicted in a six-count Superseding Indictment, which included two counts of capital murder [DE # 70]. He was arraigned on this Indictment on October 28, 2004 [DE # 81]. At a status conference held the same day, the Court granted Defendant's October 15, 2004 motion to continue the trial, resetting it to April 18, 2005.

The scheduled November 1, 2004 meeting in Washington, D.C. was postponed a second time at defense attorney's request and was rescheduled by the government to December 13, 2004. The meeting with the Capital Case Unit finally took place on this rescheduled date in Washington, D.C., during which Defense attorneys Matthewman and Rodriguez made a presentation on behalf of their client regarding the Department's death penalty determination.

On January 28, 2005, a status conference was held before this Court, where the government was given a deadline of February 18, 2005 to file a Notice of Intent to Seek the Death Penalty pursuant to 18 U.S.C. § 3593. The Court entered a written Order following the conference, in which it specifically stated that "should the government seek the death penalty in this case, notice must be provided in accord with 18 U.S.C. § 3593(a) no later than February 18, 2005" [DE # 171]. At the status conference, the Court also asked the government to give counsel, by way of a letter, a preliminary list of non-statutory aggravating circumstances upon which they would probably rely in pursuing the death penalty. The statutory aggravators had been previously provided on October 21, 2004 in the "Notice of Special Findings" section of the Superseding Indictment. The non-statutory aggravators that the government believed applied

to the case were provided by the government in a letter sent to attorneys Matthewman and Rodriguez on February 4, 2005.

On February 10, 2005, a status conference was held before United States Magistrate Judge Snow to set the motion filing schedule. Judge Snow set a deadline of February 16 for the filing of defense motions, February 25 for the filing of the government's responses, and the week of February 28, 2005 for hearings on the motions. At this conference, Magistrate Judge Snow told the Defendant that the case should be treated as if it were a death penalty case. Also on this date, attorneys Matthewman and Rodriguez requested of the government that they be allowed to make a presentation to United States Attorney Marcos Jimenez, regarding the Office's decision to seek the death penalty; the meeting was set for February 18, 2005.

On the morning of February 18, Matthewman and Rodriguez indeed made their presentation at the United States Attorney's Office in opposition to the filing of a death notice. At the close of the meeting, AUSA Bruce Brown and First AUSA Thomas Mulvihill informed defense counsel that the government would be filing a Notice of Intent to Seek the Death Penalty that day. The government filed the Death Notice with the Court on the afternoon of February 18, 2005, in compliance with the deadline imposed by the Court [DE # 246]. However, defense counsel did not receive a copy of the Death Notice by mail until February 24, 2005; the notice had been postmarked with a mailing date of February 22, 2005, which the government explains occurred as a result of the Presidents Day Weekend. In addition, notice was never personally served on the Defendant.

On February 24, 2005, United States Magistrate Judge Snow held a hearing, during which the government announced that, based on instructions from the Attorney General, an additional count charging Defendant Wilk with

the murder of a state law enforcement officer assisting a federal investigation, in violation of 18 U.S.C. § 1121, would be sought in a Superseding Indictment. On March 10, 2005, the government obtained and filed the second Superseding Indictment, which added a new Count I charging the Defendant with the murder of a state law enforcement officer assisting a federal investigation [DE # 334]. This new count was based on the same facts as the two prior counts relating to the unlawful killing of Deputy Fatta and offered no new or novel theory, which would have required additional preparation. Aside from the adding of Count I, the prior Indictment was unchanged, except for the renumbering of the remaining counts and setting forth Counts I, II, and IV as the three capital counts of the second Superseding Indictment in the Notice of Special Findings. There was also no change relating to the statutory aggravators of the capital counts.

Having obtained a second Superseding Indictment, the government sought leave to amend the notice of intent to seek the death penalty. On March 29, 2005, the Court entered an Order granting the government's motion to file an amended death notice [DE # 421]. In its Order, the Court noted that the proposed amended notice was identical to the prior notice except that it added language relating to the new charge in the second Superseding Indictment. Finding that the government sought to amend its prior notice to accurately reflect the added charge and given that the notice should conform with the indictment, the Court ruled that the existence of good cause permitted the filing of the amended notice pursuant to 18 U.S.C. § 3593(a).

On March 30, 2005, at the request of the parties, the Court held a status conference [DE # 419]. During the conference, the government inquired into the realistic nature of the April 18 trial date, setting forth the discovery issues still unresolved. After hearing from both sides, the Court deter-

mined that the interests of justice required a continuance of the trial until August 29, 2005.

II. DISCUSSION

A. Analytical Framework

In his motions, Defendant Wilk argues that the government's notice of intent to seek the death penalty and amended notice should be stricken because the government failed to provide reasonable notice prior to trial. In criminal prosecutions where the offense charged is punishable by death, the Federal Death Penalty Act requires the Government to provide notice of its intent to seek the death penalty a reasonable time before trial. 18 U.S.C. § 3593(a) states in relevant part as follows:

> If . . . the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—
>
> > (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
> >
> > (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death

Recently, the Fourth Circuit considered the issue regarding the timeliness of a death notice in *United States* v. *Ferebe*, and established an analytic framework by which to evaluate its reasonableness. 332 F.3d 722 (4th Cir. 2003). In *Ferebe*, the defendant challenged the district court's decision not to strike the Death Notice on the grounds that he did not receive the Notice within a reasonable time be-

fore trial, as required by 18 U.S.C. § 3593(a). *Id.* at 724. The divided panel determined that § 3593 is a "prophylactic statute, one of the chief aims of which is to protect the accused from having to endure a trial for his life for which he was not on reasonable notice" and "require[s] an inquiry into the objective reasonableness of the time between issuance of the Death Notice and the trial itself." *Id.* at 727. In other words, a defendant's rights are denied at the point when he proceeds toward trial, or actually to trial, in the absence of a reasonable time between his receipt of the Death Notice and his capital trial. *Id.* at 732. To this end, the Court stated that "this is so, regardless of whether he will or will not be, or was or was not, prejudiced by an unreasonably delayed Death Notice." *Id.* (emphasis in original). Therefore, the court determined that the proper analytical framework involves conducting "a pretrial inquiry into the objective reasonableness of the notice provided," rather than a post-trial assessment of the prejudice to the accused. *Id.* at 727.

To ascertain whether the time between the issuance of the Death Notice and the trial is objectively reasonable, *Ferebe* sets forth the following factors to be considered among other factors that may appear relevant: (1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings. *Id.* at 737. This is a non-exhaustive list of factors for courts to consider and no single factor is dispositive. *United States* v. *Breeden*, 366 F.3d 369, 374 (4th Cir. 2004); *United States* v. *Ponder*, 347 F. Supp. 2d 256, 263 (E.D. Va. 2004).

B. Objective Reasonableness—*Ferebe* Factors

In applying the *Ferebe* factors to the instant case, the first question the Court must answer is which trial date to use when measuring the reasonableness of the timing of the notice—April 18 or August 29. The Court concludes that the August 29 trial date should be used because the court "properly continued the trial under the Speedy Trial Act" for reasons unrelated to the government's filing of the Death Notice and the Amended Death Notice. *Breeden*, 2003 WL 22019060, *2. Therefore, the timeliness of the Death Notice and the Amended Death Notice must be gauged in relation to the properly rescheduled trial date.

The Court's decision to continue the trial date was motivated by several factors that the parties raised during the status conferences held on March 30 and April 1, 2005. First, the pretrial work-up of this case raised some concerns. As the government related at the March 30 status conference, "every other motion is claiming a lack of notice, lack of due process, lack of legal [sic] protection." (*See* transcript, DE # 468, at p. 10). Secondly, at the time of the conferences, Defendant Wilk had made no Rule 12.2(b) disclosure of mental health-related experts, although mention had been made of a defense based on AIDS dementia. Thirdly, the Defendant had yet to disclose any experts even though defense counsel had hired and consulted with at least a dozen experts. Obviously, in a case such as this, the Court would be reluctant to even consider striking a defense expert based on failure to provide timely notice. Thus, the Court realized that this would put the government at an extreme disadvantage just 20 days before the scheduled April 18 trial date. Fourthly, just five days prior to the March 30 status conference, the Defendant had filed a *Daubert* motion asking the Court to exclude all expert testimony being offered by the government.[1] It was

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[1] Thus far, the government has listed nine expert witnesses.

unknown at the time of the conference which experts' testimony would require an evidentiary hearing to determine admissibility. In addition, the matter would not be fully briefed until April 11, one week before trial.[2]

Decisions post-*Ferebe* have taken into consideration whether a scheduled trial date was continued for reasons independent of the Death Notice. In *Breeden*, the court employed the continued trial date when conducting its *Ferebe* analysis. 2003 WL 22019060. The court interpreted the *Ferebe* language stating that courts should consider the period of time before trial, measured at the instant the Death Notice was filed and "irrespective of the filing's effects," 332 F.3d at 737, to mean that a court cannot continue a case for the purpose of allowing the government to file a timely Death Notice. *Id.* at *2. However, if the court properly continues the case for reasons unrelated to the filing of the Death Notice, then the court should judge the timeliness of the Death Notice in relation to the properly scheduled trial date. *Id.* Having continued the trial for reasons unrelated to the Death Notice, specifically so that the forensics lab could fully analyze the evidence, the *Breeden* court used the continued trial date rather than the originally-scheduled trial date for *Ferebe* purposes.

Similarly, in *United States* v. *Le*, the Court continued the trial date for several reasons, chief among which was the fact that only ten days prior to the scheduled trial date,

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[2] At the status conference and in his motion for an immediate hearing, Defendant claimed that if the death notice were stricken by the Court, he would be ready to try a non-death penalty first degree murder case on April 18th. The Court finds this representation to be a convenient buttress to his *Ferebe* reasonableness argument and will not entertain it in its analysis. *See Ponder*, 347 F. Supp. 2d at 269 (finding that defense counsel's position that it was ready to proceed if the case were tried as a non-death penalty murder trial "was a backhanded attempt to render the Death Notice untimely, a tactic the Court will not condone.")

there remained unresolved more than thirty pretrial motions. 311 F. Supp. 2d 527, 533 (E.D. Va. 2004). The Court concluded that the originally-scheduled trial date "should not be used to measure the period of time remaining before trial ... because that date was cancelled for a variety of reasons, including reasons unrelated to, and independent of, any potential Death Notice." *Id.*

In *Ponder*, the court also determined that the pertinent inquiry involved examining whether a trial date is continued in order to rescue an untimely Death Notice. 347 F. Supp. 2d at 267. Accordingly, the court examined whether the case was actually going to trial on the scheduled trial date and whether the reason the trial was continued had to do with the filing of the Death Notice. The court ultimately continued the case because of the nature of the evidence, which involved DNA evidence, and the slow pace of discovery. *Id.* at 270. The court also noted that in reviewing the transcript of the status conference held approximately six weeks before trial, which primarily addressed the practicality of the scheduled trial date, "there was no question that, regardless of whether the Government ultimately decided to seek the death penalty, a continuance would be granted so that *both parties* would have adequate time to prepare for trial, and in particular so that the defense would have ample time to prepare." *Id.* at 269.

As in *Ponder*, *Le*, and *Breeden*, the Court continued the case for a variety of reasons unrelated to the timing of the Death Notice. Therefore, the Court concludes that the August 29 trial date is the appropriate date for applying the following *Ferebe* factors.

1. *The Interval Between the Filing of the Death Notice and the Trial Date*

Under *Ferebe*, courts must examine "the period of time remaining before trial, measured at the instant the death Notice was filed and irrespective of the filing's effects."

Ferebe 332 F.3d at 737. In calculating this interval, the Court must consider two dates: the date the Death Notice was formally filed and the trial date. *See United States* v. *Hatten*, 276 F. Supp. 2d 574, 579 (S.D. W.Va. 2003).

Using the August 29 trial date, over six months exist between the filing of the Death Notice and the trial date. The Court finds this to be a reasonable amount of time under § 3593(a). *See Breeden*, 2003 WL 22019060, *3 (calculating a period of six months and twenty-five days between the filing of the Death Notice and the trial date and finding that "no court has suggested that a period of nearly seven months is unreasonable."). Additionally, the Court notes that even Mr. Matthewman agreed on the record that "[a] reasonable time is at least six months prior to trial." (*See* January 28, 2005 transcript, DE # 461, at p. 7).

Though the Court finds that the August 29 trial date should be the date used in analyzing the *Ferebe* factors, in order to provide a thorough analysis, the Court will examine the reasonableness of the Death Notice filed using the April 18 trial date. Using this date, two months existed between the filing of the Death Notice and the trial date. However, the Court established this schedule in advance, having ordered the government to file its Death Notice by February 18.[3] (*See* DE # 171). The Court set this deadline

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[3] Defendant argues that the government did not comply with the Court's deadline because it did not mail the Death Notice to counsel until February 22 so that it was not received until February 24, 2005. The government partially attributes this delay to the Presidents Day Weekend. Though the Court does not condone the government's delay in mailing its notice, it finds that notice was indeed provided to defense counsel on April 18th. At the close of the meeting held on February 18 at the United States Attorney's Office, AUSA Bruce Brown and First AUSA Thomas Mulvihill personally informed defense counsel that the government would be filing a Notice of Intent to Seek the Death Penalty that day. The Death Notice was indeed filed with the Court on the afternoon of April 18, 2005. In

because it found it would provide Defendant notice of the government's intent to seek the death penalty a reasonable amount of time before trial. Therefore, by setting this deadline in advance, the January 28, 2005 Order became a prophylactic measure as the term is used in *Ferebe*. As such, it complies with the reasonable notice requirement of 18 U.S.C. § 3593(a) and *Ferebe's* interpretation of § 3593(a) as a prophylactic statute[.]

2. The Nature of the Charges

Ferebe also instructs courts to consider the "nature of the charges presented in the indictment." 332 F.3d at 737. However, "[i]t is not altogether clear how this factor should be weighed or in which direction observations regarding this factor should cut." *Ponder*, 347 F. Supp. 2d at 263. As stated by the district court in *Ponder*, "rather than provide precise guidance on the contours of § 3593, *Ferebe* 'provides an elucidation, or more precisely, an elaboration of the statute.'" *Id.* at 262 (*citing United States* v. *Le*, 311 F. Supp. 2d 527, 531 (E.D. Va. 2004)). Decisions interpreting *Ferebe*, however, help to elucidate the application of the four factors.

In *Ponder*, for instance, the Court clarified that cases applying *Ferebe* had taken the following two approaches in analyzing the first factor: (1) considering the time between the filing of the Death Notice and the scheduled trial date to determine whether the defendant would have an adequate time to prepare a defense; or (2) consider whether the timing was reasonable from the perspective of the government. *Id.* (discussing *United States* v. *Le*, 311 F. Supp. 2d 527 (E.D. Va. 2004) and *United States* v. *Hatten*, 276 F. Supp. 2d 574 (S.D. W.Va. 2003)). The *Ponder* court adopted the second approach, which involved considering whether the timing of the Death Notice was reasonable from the per-

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addition, there is no statutory requirement of personal service as opposed to service on the Defendant's duly appointed counsel.

spective of the government given the nature of the charges in the indictment. *Id.* at 263-64. In other words, the court examined whether the government should have filed the Death Notice earlier than it did given the nature of the charges in the indictment and the status of the discovery and inspection process.

Applying either approach, the Court finds that the timing of the Death Notice was reasonable under both trial dates. With respect to whether Defendant Wilk would have a reasonable amount of time to prepare his death defense given the nature of the charges, the charges involved are not as complex as asserted by the Defendant. The homicide charges are rather basic; only the obstruction of justice and pornography allegations, which form part of Defendant's intent, involve any degree of intricacy. Thus, two months, let alone six months, would be sufficient time to prepare a defense.

Taking the perspective of the government in the second approach, the Court finds that the government need not have filed the Death Notice earlier than it did. First of all, the Court notes that the government filed its notice by the court-established deadline of February 18. In addition, as the government points out, Defense counsel twice requested that the meeting with the Capital Crimes Unit be continued. The meeting had originally been scheduled for October 18, 2004, and was extended first to November 1 and then to December 13, 2004. Thus, of the nearly four months it took from the time of the first Superseding Indictment to the time the government filed the Death Notice, nearly two months were expended before the attorneys for the Defendant and the Department of Justice met in Washington. The Court finds that the government did not intentionally delay in filing the Death Notice.

3. The Nature of the Aggravating Factors

A third *Ferebe* factor involves analyzing the nature of the aggravating factors provided in the Death Notice. Again, possibly bewildered as to how to apply this factor, courts post-*Ferebe* have approached the analysis differently, some from the government's perspective and others from the defendant's. *See Ponder*, 347 F. Supp. 2d at 265 (considering the government's timing in filing the Death Notice); *Le*, 311 F. Supp. 2d at 535 (inquiring into whether defendant had sufficient time to prepare for trial given the nature of the aggravating factors); *Breeden*, No. CR. 3:03CR00013, 2003 WL 22019060, *3 (W.D. Va. 2003) (interpreting the factors in light of defendant's ability to prepare for trial); *Hatten*, 276 F. Supp. 2d at 578 (analyzing the government's timing and delay in filing the Death Notice). In *Ponder*, the court again noted that "[t]he same confusion described above about how to approach the first *Ferebe* factor exists with regard to how to evaluate this one." 347 F. Supp. 2d at 265-66.

Here, the aggravating factors merely track the statute's language and are reflective of the same facts that are in the homicide charges themselves. The Court finds that Defendant Wilk could have adequately prepared his death defense in two months, let alone six, given the nature of the aggravating charges and the prior notice provided in the first Superseding Indictment "Notice of Special Findings" section filed on October 21, 2004. Taking the perspective of the government, there is nothing about the nature of the aggravating factors to suggest that the government should have acted sooner to file the Death Notice especially in light of the Court's *ordered* deadline.

4. The Status of Discovery in the Proceedings

The fourth *Ferebe* factor directs courts to consider "the status of discovery in the proceedings." 332 F.3d at 737. The Court finds that discovery will undoubtedly be com-

pleted long before the August 29 trial date. With respect to the April 18 trial date, the incomplete status of the discovery was indeed one of the reasons for the continuance and further supports the Court's use of the August date as the operative trial date for *Ferebe* purposes. However, in analyzing the April trial date, even though the incomplete status of discovery weighs in favor of the Defendant, the Court finds that this factor alone is insufficient to overcome the weight of the remaining factors. In addition, the Court notes that although the trial was continued due, partially, to discovery issues affecting both sides, discovery was mostly complete from the government's side. At the time of the March 30 status conference, Defendant had yet to disclose any defense experts or produce any mental health evidence even though the Defendant had consulted at least a dozen experts.[4]

5. Other Factors

Since *Ferebe* did not set forth an exhaustive list of factors for courts to consider, the Court will mention other factors that it determines relevant to the reasonableness analysis. *See Breeden*, 366 F.3d 369, 374 ("In *Ferebe*, the court set forth a non-exhaustive list of factors . . ."); *Ponder*, 347 F. Supp. 2d at 263. *Ferebe* maintains that a defendant has a substantive right not to be tried for a capital sentence without receiving reasonable notice. Objective reasonableness must consider what transpired in the case prior to the filing of the death notice. Here, the Court notes that in its first Superseding Indictment of October 21, 2004, the government included a section titled "Notice of Special Findings." This section listed the statutory aggravating factors that were later relied upon in the Death Notice. The government was not required to include this section in the Indictment, but by including it, the Court finds that Defend-

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[4] Obviously, the Court recognizes that the Defendant could elect not to use any experts or offer mental health evidence in his defense.

ant was put on notice of the statutory aggravating factors justifying a death sentence.

Therefore, after applying the *Ferebe* factors, the Court finds that the government provided its Death Notice a reasonable amount of time before trial based on either an April 18 or August 29 trial date.

C. The Amended Death Notice

With respect to the Amended Notice, the government sought to amend the death notice to reflect the changes made in the second Superseding Indictment returned on March 10, 2005. On March, 29, 2005, the Court granted the government's motion to amend the death notice, finding the existence of good cause pursuant to 18 U.S.C. § 3593(a). Given that the Court has determined that the trial date to be used is August 29, 2005, the Amended Death Notice, which was granted by the Court on March 29, 2005, was filed five months prior to the trial date. The Court finds this to be reasonable notice. Employing the April 18 trial date, however, the Amended Death Notice appears on its face to be somewhat problematic in that it was filed 20 days prior to the April 18 trial date. Nevertheless, as the Court noted in its Order granting the amendment, the second Superseding Indictment did not change the Notice of Special Findings relating to the statutory aggravators for the capital counts. In addition, the proposed amended notice did not change the non-statutory aggravators of the prior notice. In fact, the proposed amended notice is identical to the prior notice except that it includes language relating to the added charge in the second Superseding Indictment of murder of a state law enforcement officer assisting a federal investigation. The added charge was based on the same facts as the two former capital counts and required little or no additional preparation.

Thus, the Court finds that there has been no change in the statutory aggravators since the filing of the first Super-

seding Indictment on October 21, 2004. As such, the filing of the amended notice 20 days before trial does not affect the reasonableness analysis under *Ferebe*. Having found that the filing of the Death Notice two months before trial on February 18 was reasonable and that the Amended Death Notice did not change the statutory aggravators, the Court finds that Amended Notice also meets the reasonableness requirement of § 3593(a).

D. *Ferebe's* Value in the Eleventh Circuit

The *Ferebe* opinion does not consider the element of prejudice to the Defendant in its analysis of the reasonableness of the filing of the Death Notice. Judge Niemeyer in his dissent ably discusses the weakness in the majority's opinion:

> In sum, we are presented in this appeal with a pretrial order denying a defendant's motion to strike a death penalty notice made on the ground that it was not given a "reasonable time before the trial." 18 U.S.C. § 3593(a). Yet, the trial that is referred to in the statute has not even as of now commenced, much less been completed. Because there has been no trial, no one can conclusively determine whether the notice was given a reasonable time before trial. Moreover, no one can state whether the defendant was adversely affected in any way by a notice which cannot even be denominated "late."

Ferebe, 332 F.3d at 750. *Ferebe* "freezes the inquiry into the reasonableness of timing as of the time the notice is filed and presents the district court, in effect, with only the options of striking the notice or not striking the notice. It denies the court any flexibility in managing the period of trial preparation by scheduling or postponing trial to give the defendant a reasonable time to prepare." *Id.* at 749.

This is an issue of first impression in the Eleventh Circuit. The Fourth Circuit, in a 2 to 1 decision, said that the defendant has a substantive right not to be tried for a capital sentence without having received reasonable notice, and that the issue of prejudice to the accused cannot be considered in determining the objective reasonableness of the notice provided. Does 18 U.S.C. § 3593(a) afford a defendant a procedural guarantee that he will be given adequate time to prepare for a death penalty trial or a substantive right not to be tried for a capital sentence absent reasonable notice? Is prejudice a proper consideration in determining the reasonableness of the death notice? These are questions which have not been addressed by our Circuit. This Court believes that the better-reasoned position includes a prejudice analysis.

Since the Court questions whether this Circuit will adopt a standard that does not take into account the issue of prejudice to the Defendant, the Court finds it relevant to engage in a prejudice analysis. In this case, it was not surprising that the government, in fact, filed a Death Notice. From the Defendant's first court appearance before United States Magistrate Judge O'Sullivan, the day following the fatal shooting of Deputy Fatta, the specter of the death penalty has blanketed this case like a thick fog.

The Court, in setting a deadline for the filing of the Death Notice, considered the degree of preparation for a penalty phase already undertaken by the Defendant. In this regard, the Court notes that two death qualified attorneys were appointed to represent the Defendant—one on August 20, 2005 and the second on October 14, 2005. Through ex parte motions, defense counsel have requested funds to hire a total of twelve expert witnesses. All but one request was granted.[5] To date, the Court has authorized

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[5] Since the motions and orders have been sealed at the request of Defendant, the Court at this time is precluded from discussing the

the expenditure of over $145,000 for experts, an investigator, and other litigation-associated expenses. Additionally, over 60 motions have been filed by the Defendant. The death penalty has been addressed at each status conference held by this Court, beginning in October 2004. United States Magistrate Judge Lurana S. Snow, who has heard almost all of the pretrial motions, advised defense counsel early on to consider this a death penalty case. Moreover, at the January 28 status conference, the Court discussed with the parties the written juror questionnaires to be mailed out January 31, and specifically included numerous questions addressing the death penalty and jurors' attitude toward the death penalty. For defense counsel to now suggest surprise strikes this Court as being opportunistic and disingenuous.

Examining the prejudice, if any, caused to the Defendant by the government's filing of the Death Notice two months before trial, the Court finds that Defendant was not prejudiced given the Court-appointed services provided since the day following the Defendant's arrest. The Amended Death Notice merely parroted information which was already known. Finally, the rescheduled trial date of August 29 affords the Defendant over six months from the filing of the Death Notice, which is the time the Defendant agreed was reasonable.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant, Kenneth Wilk's Motion to Strike Government's "Notice of Intent to Seek the Death Penalty" and For An Order Barring the Government F[ro]m Seeking the Death Penalty, Due to Failure to Provide

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experts' areas of expertise. But, suffice it to say, some of the experts relate solely to penalty phase issues and one such expert was authorized as early as October, 2004.

Reasonable Notice of Intent to Seek the Death Penalty Prior to Trial filed on March 8, 2005 [D.E. # 320] is hereby **DENIED**.

2. Defendant Kenneth Wilk's Motion to Strike the Government's Amended Notice of Intent to Seek the Death Penalty filed on March 31, 2005 [D.E. # 438] is hereby **DENIED**.
3. Defendant Kenneth Wilk's Motion For An Immediate Hearing on His "Motion to Strike the Government's Amended Notice of Intent to Seek the Death Penalty" [DE # 443] is hereby **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida, this 27th day of April, 2005.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[SEAL]

No. 05-12694-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH WILK A.K.A. KENNETH P. WILK
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

AUGUST 15, 2006

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: DUBINA and HULL, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

* Honorable Jane A. Restani, Chief Judge, U. S. Court of International Trade, sitting by designation.

ENTERED FOR THE COURT:

/s/ Frank M. Hull ORD-42

UNITED STATES CIRCUIT JUDGE

APPENDIX D

RELEVANT STATUTORY PROVISIONS

1. Section 3593 of Title 18 of the United States Code provides:

§ 3593. Special hearing to determine whether a sentence of death is justified

(a) Notice by the government.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty

to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors.—Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion.

The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any mem-

ber of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death.—If, in the case of—

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious

beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

* * * * *

2. Section 3595 of Title 18 of the United States Code provides:

§ 3595. Review of a sentence of death

(a) Appeal.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) Review.—The court of appeals shall review the entire record in the case, including—

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) Decision and disposition.—

(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592.

(2) Whenever the court of appeals finds that—

(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

No. 06-672

In the Supreme Court of the United States

KENNETH P. WILK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
STEVEN L. LANE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Federal Death Penalty Act of 1994 requires the government to file its notice of intent to seek the death penalty "a reasonable time before the trial." 18 U.S.C. 3593(a). The questions presented are:

1. Whether the denial of a defendant's motion to strike the government's notice of the death penalty as untimely is immediately appealable as a collateral order.

2. Whether the reasonableness of the notice must be assessed by reference to any scheduled trial date at the moment the notice is filed, rather than the date to which the trial date is continued.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 452 F.3d 1208. The order of the district court (Pet. App. 32a-51a) is reported at 366 F. Supp. 2d 1178.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2006. A petition for rehearing was denied on August 15, 2006 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on November 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Southern District of Florida charged petitioner with, *inter alia*, three capital

offenses stemming from the killing of a local law enforcement officer who had been assisting in a federal investigation. Pet. App. 5a, 12a. The government filed a notice of intent to seek the death penalty. *Id.* at 11a, 14a. Before trial, petitioner moved to strike the notice as untimely. *Id.* at 12a, 14a. The district court denied the motion, and petitioner took an interlocutory appeal. *Id.* at 32a-51a. The court of appeals affirmed. *Id.* at 1a-31a.

1. In any case in which the government decides to seek the death penalty for a capital-eligible offense, the Federal Death Penalty Act of 1994 (FDPA) requires the government to file with the court a notice stating its intention to "seek the sentence of death" and "setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." 18 U.S.C. 3593(a)(1) and (2). The notice must be filed "a reasonable time before the trial or before acceptance by the court of a plea of guilty." 18 U.S.C. 3593(a). "The court may permit the attorney for the government to amend the notice upon a showing of good cause." *Ibid.*

2. In 2001, petitioner threatened law enforcement personnel during the prosecution of his domestic partner, Kelly Ray Jones, on federal child pornography charges. Some of the threats were made over the Internet, and petitioner's online profile listed such hobbies as "cop bashing" and "hunting cops." Pet. App. 2a. In July 2004, Jones, who was precluded from using the Internet as a condition of his supervised release, transmitted child pornography to an undercover law enforcement officer using petitioner's Internet account and a computer located at a residence the two shared. *Ibid.* Following Jones's arrest, petitioner attempted to intimi-

date and discredit a witness and deleted e-mails relevant to Jones's prosecution. *Id.* at 2a-3a. Thereafter, investigators obtained warrants to arrest petitioner and search his residence for evidence of child pornography and witness tampering. *Id.* at 3a.

On August 19, 2004, Deputy Sheriff Todd M. Fatta and Sergeant Angelo Cedeno, both of the Broward County Sheriff's Office, assisted federal agents in executing the warrants. Pet. App. 3a. Shots were fired as the officers entered the residence, and both Cedeno and Fatta were wounded. *Ibid.* Fatta died from his injuries. *Ibid.* Petitioner was the only person found at the residence, *ibid.*, and later told police that he accidentally shot Fatta. Pet. 3.

3. On August 26, 2004, a grand jury charged petitioner with child pornography offenses and witness and evidence tampering. Pet. App. 3a. Although capital charges were added later, the court and the parties treated petitioner's case as a potential death penalty prosecution from the beginning. *Id.* at 3a-4a. The district court appointed an experienced capital defense attorney for petitioner. *Id.* at 3a. In September 2004, petitioner made a presentation to the United States Attorney's Office about the propriety of capital punishment in connection with Fatta's murder, and a similar meeting was scheduled with Department of Justice (DOJ) officials in Washington. *Id.* at 4a.

After the government confirmed in October 2004 that it was considering seeking the death penalty in connection with a forthcoming superseding indictment, the district court granted petitioner's request for the appointment of a second capital defense lawyer and approved the hiring of an investigative firm and mitigation specialist. Pet. App. 4a-5a; see 18 U.S.C. 3005. The court

also granted petitioner's motion for continuance of the trial date, in which petitioner had relied upon the possibility of capital charges as a reason why more time was needed. The court rescheduled the trial for December 13, 2004. Pet. App. 4a-5a. In the months that followed, the district court conducted *ex parte* proceedings in which it approved petitioner's retention of more than ten experts and authorized numerous expenditures for his experts, investigators, and mitigation specialist. See *id.* at 5a-13a.

On October 21, 2004, the government filed a superseding indictment that added four new counts against petitioner, two of which carried a possible death sentence in connection with Fatta's murder: (1) murdering Fatta with malice aforethought, in violation of 18 U.S.C. 1111(a) and 1114; and (2) using and carrying a firearm during and in relation to Fatta's murder, resulting in death, in violation of 18 U.S.C. 924(j)(1). Pet. App. 5a; 10/21/04 Indictment 8-10. The superseding indictment cited the FDPA and alleged statutory aggravators and culpability factors that, if proved, would render petitioner eligible for the imposition of a death sentence. Pet. App. 5a-6a; see 18 U.S.C. 3591(a)(2), 3592(c).[1]

On October 28, 2004, petitioner requested a continuance of the December 13, 2004, trial date, asserting that more time was needed to resolve outstanding discovery

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[1] The superseding indictment alleged, *inter alia*, that petitioner: intentionally killed Fatta, see 18 U.S.C. 3591(a)(2)(A); knowingly created a grave risk of death to one or more persons in addition to Fatta, see 18 U.S.C. 3592(c)(5); committed the murder after substantial planning and premeditation, see 18 U.S.C. 3592(c)(9); and intentionally killed or attempted to kill more than one person in a single criminal episode, see 18 U.S.C. 3592(c)(16). Pet. App. 5a-6a; 10/21/04 Indictment 16-18.

issues and to accommodate the defense's meeting with DOJ officials about whether the government would seek the death penalty, which had been postponed at petitioner's request. Pet. App. 6a, 44a. The government suggested a May 2005 trial date based on its belief that, by that time, discovery would be complete and a decision would be made on whether to seek the death penalty. *Id.* at 6a. Petitioner asserted that the defense could not be ready for trial by May, particularly if the government were to seek a capital sentence. *Id.* at 6a-7a. Over petitioner's objection, the district court reset the trial for April 18, 2005. *Id.* at 7a.

On January 28, 2005, the government stated that it did not expect a final decision on whether capital punishment would be sought until February 25 because the new Attorney General had not yet taken office. Pet. App. 8a. The government asserted that February 25 would be a "reasonable time" before the scheduled April 18, 2005, trial date because (1) petitioner had been represented by two defense attorneys since October 2004 in anticipation of a capital prosecution; and (2) the court had already approved petitioner's retention of experts, investigators, and a mitigation specialist. *Id.* at 8a-9a. When petitioner asserted that February 25 would not be reasonable and that he could not be ready for a capital trial by April 18, the district court stated that "it would probably behoove [petitioner] to assume that the government will be seeking the death penalty." *Id.* at 9a. The court confirmed that the trial was set for April 18 and directed the government to file its notice of intent to seek the death penalty no later than February 18. *Ibid.* To assist petitioner in his preparation for a likely capital trial, the government agreed to provide him with a list of the non-statutory aggravating factors on which it in-

tended to rely; petitioner received the list on February 4, 2005. *Id.* at 9a & n.7. The parties also began preparing the juror questionnaire, which included inquiries about capital punishment. *Id.* at 9a-10a.

On February 18, 2005, the government filed its notice of intent to seek the death penalty, which listed the same statutory aggravating factors that were alleged in the superseding indictment and four non-statutory aggravators. Pet. App. 11a.[2] On March 8, 2005, petitioner filed a motion to strike the death penalty notice as untimely under Section 3593(a). *Id.* at 12a.

On March 10, 2005, the government filed a second superseding indictment that added a third capital count charging petitioner with intentionally killing Deputy Sheriff Fatta while Fatta was assisting in a federal investigation, in violation of 18 U.S.C. 1111 and 1121(a)(1)(A) . Pet. App. 12a. The statutory aggravators and culpability factors alleged in the second superseding indictment were identical to those set forth in the October 2004 indictment and the February 18 death penalty notice. *Id.* at 12a-13a. On March 29, 2005, the district court granted the government's motion for leave to file an amended death penalty notice, noting that the amended notice was identical to the February 18 notice except for language describing the new count. *Id.* at 14a, 36a; see 18 U.S.C. 3593(a). On March 31, 2005, peti-

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[2] The alleged non-statutory aggravators were that petitioner: (1) killed Fatta in an attempt to obstruct justice; (2) may be convicted contemporaneously of offenses in addition to the murder; (3) was a danger to others; and (4) caused injury and harm to Fatta's family. Pet. App. 12a. Although the record does not conclusively establish that the alleged non-statutory aggravators were the same factors included in the government's February 4 list (*id.* at 12a n.9), petitioner does not contend that new or different factors were included in the notice (Pet. 5-6).

tioner moved to strike the amended death penalty notice as untimely. Pet. App. 14a.

The district court held conferences in late March and early April 2005 to discuss the numerous pending motions[3] and other issues. Pet. App. 14a, 16a. The government stated that it could be ready for trial on April 18 but suggested postponing the trial until late summer or early fall, citing petitioner's failure to have disclosed his expert witnesses and potential mental health defense. *Id.* at 15a. Petitioner urged the court instead to strike the death penalty notice and bring the matter to trial on April 18 as a non-capital case. *Id.* at 16a. The court found that "the interest of justice served by a continuance far outweighs any interest of the public and [petitioner] in a speedy trial" and postponed the trial until August 29, 2005. *Id.* at 17a.

4. On April 27, 2005, the district court denied petitioner's motion to strike the death penalty notice. Pet. App. 32a-51a. In assessing whether the time between the notice and the trial was "objectively reasonable," the court was guided by the non-exhaustive list of factors articulated in *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003): "(1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time re-

[3] On February 16, petitioner filed 39 motions, including, *inter alia*, a motion to strike the statutory aggravating factors alleged in the superseding indictment. Pet. App. 10a-11a. On March 25, 2005, petitioner filed a host of additional motions, including, *inter alia*, a motion to dismiss the second superseding indictment on speedy trial grounds, seven motions to dismiss portions of the second superseding indictment for other reasons, and a motion to exclude all nine of the government's expert witnesses under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Pet. App. 14a; *id.* at 39a & n.1.

maining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings." Pet. App. 38a (footnote omitted) (quoting 332 F.3d at 737).

The court then turned to the question of "which trial date to use when measuring the reasonableness of the timing of the notice," April 18, the scheduled trial date when the government filed its notice on February 18, or August 29, the scheduled trial date when the court ruled on the defendant's motion to strike the notice of intent to seek the death penalty. The court explained that it would be appropriate to use the August 29 trial date in calculating the amount of time between the death penalty notice and the trial because the April 18 date had been continued for reasons unrelated to the filing of the notice, such as the numerous unresolved motions and petitioner's failure to have disclosed his expert witnesses. Pet. App. 39a-41a. But regardless of which of the two dates was used, the court concluded that the notice was filed "a reasonable time before the trial." *Id.* at 42a-43a.

The court found that "two months, let alone six months, would be sufficient time to prepare a defense" because the "homicide charges are rather basic," and because "the aggravating factors merely track the statute's language and are reflective of the same facts that are in the homicide charges themselves." Pet. App. 44a-45a. Regarding discovery, the court observed that the disclosures were "mostly complete from the government's side" but that petitioner "had yet to disclose any defense experts or produce any mental health evidence even though [he] had consulted at least a dozen experts." *Id.* at 46a (footnote omitted). Lastly, the court

stressed that the October 2004 superseding indictment "listed the statutory aggravating factors that were later relied upon in the Death Notice" and thus "put [petitioner] on notice of the statutory aggravating factors justifying a death sentence" long before trial. *Id.* at 46a-47a.[4]

5. The court of appeals affirmed. Pet. App. 1a-31a. The court rejected the government's argument that the district court's interlocutory order was not immediately appealable. Instead, it joined the Fourth Circuit in holding that a "district court's order denying a motion to strike the government's death notice [is] reviewable as a collateral order" under 28 U.S.C. 1291 "because such orders 'are conclusive, collateral to the merits, and if wrongly decided will irreparably deprive capital defendants of an important right.'" Pet. App. 21a (quoting *Ferebe*, 332 F.3d at 730) (brackets in original).

Turning to the merits, the court of appeals concluded, based on the "totality of the circumstances," that the government filed its death penalty notice an "objectively reasonable" time before trial. Pet. App. 23a; see *id.* at 30a.[5] The court rejected petitioner's argument

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[4] The court concluded that the filing of the amended death penalty notice 20 days before the April 18 trial date "d[id] not affect the reasonableness analysis under *Ferebe*" because it merely added a description of a new charge that was "based on the same facts as the two former capital counts and required little or no additional preparation." Pet. App. 47a-48a. Petitioner himself treats (Pet. 23) the February 18 date as the appropriate starting point in calculating the time remaining before the trial.

[5] The court stated that it would be appropriate to consider factors including, but not limited to, the following: "(1) what transpired in the case before the formal Death Notice was filed; (2) the period of time remaining for trial after the Death Notice was filed; (3) the status of discovery and motions in the proceedings; (4) the nature of the charges

that the scheduled April 18 trial date should be used in the analysis, noting that the trial was continued to August 29 for reasons unrelated to the death penalty notice, and that Section 3593(a) does not in any event preclude a continuance in the trial date "to assure that defendants have adequate time to prepare a defense to the death penalty." *Id.* at 29a. Employing the August 29 date, the court concluded that the six-month period between notice and the trial was "clearly adequate to prepare a death defense in this case." *Id.* at 25a; *id.* at 30a. "[F]rom the start," the court explained, "all parties knew this was a likely death penalty case." *Id.* at 24a. The court observed that petitioner's counsel, "who had extensive capital crimes experience, began to prepare a death defense months before the Death Notice was filed," securing the appointment of co-counsel, hiring experts, and obtaining funds for investigators and a mitigation specialist. *Ibid.* The court further noted that the October 2004 superseding indictment gave petitioner notice of the statutory aggravating circumstances months before the death penalty notice was filed, and that the non-statutory aggravating circumstances set forth in the notice were "straightforward." *Id.* at 30a. Finally, because petitioner's numerous motions for funding and experts were submitted *ex parte*, the court was unable to "describe the nature of the potential defenses revealed therein"; nevertheless, the court concluded that "six months is clearly more than sufficient time no matter what approach the defense decides to take." *Ibid.*

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in the indictment; (5) the nature of the aggravating factors claimed to support the death penalty; and (6) the anticipated nature of the defense, if known." Pet. App. 23a.

ARGUMENT

Petitioner contends (Pet. 11) that this Court's review is warranted to resolve a conflict among the circuits on how to determine whether a death penalty notice was filed a "reasonable time" before trial. He also notes (Pet. 25-30) that, if the Court granted certiorari, it could resolve the circuit conflict on whether review under the collateral order doctrine is available from the denial of a motion to strike a death penalty notice as untimely. Both of those questions implicate disagreements in the circuits, but the issues are narrow ones that have received consideration in only a handful of courts. As to jurisdiction, only three courts of appeals have considered the issue, and, although two of them (including the court below) have resolved it erroneously, those holdings appear unlikely to prove problematic as a practical matter. And, as to the merits, only two courts of appeals have considered the issue. The court of appeals in this case resolved it correctly, and the government has adopted prophylactic procedures in the other court to protect against adverse results. Consequently, it is, at present, unlikely that any defendant will prevail on a deficient-notice claim under the current state of the law. While national uniformity in the administration of the federal death penalty is desirable and this Court's review may be warranted if the conflict grows wider or generates in the future actual conflicting outcomes, at present the issues do not warrant this Court's review.

1. The court of appeals held that the district court's order denying petitioner's motion to strike the government's death penalty notice as untimely was subject to immediate review as a collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Pet. App. 20a-21a. The court of appeals expressed its agreement with the Fourth Circuit's reasoning that such orders "are conclusive, collateral to the merits, and if wrongly decided will irreparably deprive capital defendants of an important right." *Id.* at 21a (quoting *Ferebe*, 332 F.3d at 730). The court of appeals erred in so holding. Even if petitioner were correct about the proper method for determining the adequacy of notice (*i.e.*, by reference to the scheduled trial date, rather than any continued trial date), he cannot establish that an order denying a motion to dismiss for the untimely filing of a capital notice qualifies for review under the collateral order doctrine.

An order meets the requirements of that doctrine only if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits, and (3) is effectively unreviewable in an appeal from a final judgment. *Sell* v. *United States*, 539 U.S. 166, 176 (2003); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Petitioner fails at least the third criteria for review, and, on a proper understanding of the right conferred by Section 3593(a), fails the first and second as well.

Even assuming petitioner is correct that a court must consider the scheduled trial date at the time the notice is filed, despite the rescheduling of the trial to a later date, an order denying a motion to strike a death penalty notice is subject to review at the conclusion of the case. The reasonable time requirement under the FDPA does not give the defendant a right not to be tried on a capital offense; it provides instead the right to have adequate time to prepare for a capital trial. It is therefore subject to review after the entry of judgment in a capital trial. As this Court has made clear in a variety

of contexts, virtually any defense could be described as a right not to stand trial, yet the Court has closely guarded the category of claims that so qualify in order to avoid erosion of the final judgment rule. See *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (per curiam); *United States* v. *Robinson*, 473 F.3d 487, 491 (2d Cir. 2007) (citing *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

The final judgment rule is of particular force in criminal cases. *Midland Asphalt Corp.*, 489 U.S. at 799; accord *Hollywood Motor Car Co.*, 458 U.S. at 265 (policy against "piecemeal appellate review * * * is at its strongest in the field of criminal law"); *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978) ("The rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law.") (internal quotation marks omitted). This Court has recognized only three general types of decisions in criminal cases that are reviewable under the collateral order doctrine: the denial of a motion to reduce bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951), the denial of a motion to dismiss an indictment under the Double Jeopardy Clause, *Abney* v. *United States*, 431 U.S. 651 (1977), and the denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979).

The FDPA's notice provision is not akin to those types of decisions. Rather it is akin to other notice provisions in federal law: it protects against a defendant's being tried without sufficient time to prepare. *Ferebe*, 332 F.3d at 747 (Niemeyer, J., dissenting) ("[T]he protection afforded to the defendant by § 3593(a) is not a right not to be tried as a capital defendant. Instead, it

is a procedural guarantee ensuring that the defendant has a sufficient time for preparation between the government's death penalty notice and trial."); accord *Robinson*, 473 F.3d at 492. Unlike a double jeopardy or speech and debate claim, a deficient-notice claim does not challenge the government's power to try the defendant for a crime or to impose a punishment. Nothing in Section 3593(a) explicitly guarantees a defendant that "trial will not occur" absent the requisite notice. *Midland Asphalt*, 489 U.S. at 801. Rather, because Section 3593(a) is a notice provision, violations can be fully vindicated on post-trial review, where the court of appeals can assess whether there was any deficient notice and, if so, what remedy is appropriate. Accordingly, because error under Section 3593(a) is effectively reviewable on appeal from a final judgment, it does not qualify for interlocutory review under the collateral order doctrine.[6]

The availability of effective review after entry of a final judgment is sufficient to preclude appeal under the collateral order doctrine even on petitioner's interpretation of the FDPA. But petitioner cannot satisfy the re-

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[6] For related reasons, even on petitioner's theory of the timing analysis, a denial of a motion to strike a death penalty notice as untimely under Section 3593(a) does not raise an issue completely separate from the merits—the second criteria for collateral-order review. If a capital trial does take place without affording the defendant a "reasonable time" after the filing of the Section 3593(a) notice, the error would be subject to harmless-error review. Developments that unfold at trial can make clear that the defendant was not and could not have been prejudiced by any alleged deficiencies in notice. If a notice-related error can be rendered harmless, then the alleged error does not "resolve an important issue completely separate from the merits," *Coopers & Lybrand*, 437 U.S. at 468, because assessment of the notice error could be affected by events during the trial. *Midland Asphalt*, 489 U.S. at 800.

quirements for collateral order review for additional reasons if, as the court of appeals correctly held, a claim of deficient notice under Section 3593(a) is properly assessed by comparing the date of the notice to the scheduled date of a trial as continued. Under that interpretation of the FDPA, a denial of a motion to dismiss a notice as untimely is not conclusive on the disputed question whether the government has given petitioner a reasonable notice of its intent to seek the death penalty in advance of trial. "If [petitioner], during or after trial, renews his motion to strike, the court will be able to evaluate the merits of his motion in light of the period between the government's death penalty notice and the trial date to determine whether the notice was filed a reasonable time before the trial." *Ferebe*, 332 F.3d at 751 (Niemeyer, J., dissenting).

The reasonableness of the notice, in light of the actual trial date, is also not completely separate from the merits of the criminal case against the defendant. In many cases, whether a defendant received reasonable notice will depend on whether the timing of the government's notice denies or adversely affects his ability to prepare his defense, and that determination "can only be measured by the defense that the defendant presented at trial" as well as "the nature and complexity of the case" in light of what proceeds at trial. *Ferebe*, 332 F.3d at 748 (Niemeyer, J., dissenting).

In finding jurisdiction to review the trial court's order, the court of appeals reasoned that a post-trial determination that the government's notice was unreasonable would result in a "colossal waste of time, effort and expense for both litigants and the courts." Pet. App. 21a n.17 (quoting *United States* v. *McGriff*, 427 F. Supp. 2d 253, 267 (E.D.N.Y. 2006)). But petitioner "may be tried

on the substantive charges on which he was indicted, regardless of whether or not the death penalty may be imposed." *Robinson*, 473 F.3d at 491. In any event, the same practical concerns relied upon by the court of appeals "might be cited in the context of a number of rights for which pretrial dismissal is a permissible remedy," such as the Sixth Amendment right to a speedy trial, yet the defendant must undergo a full-blown trial and wait until the criminal case is concluded before seeking an appeal. *Id.* at 492; see *Midland Asphalt Corp.*, 489 U.S. at 801.

2. Although it should not have reached the merits, the court of appeals correctly held that, in determining the reasonableness of the government's notice, a court is not required to consider only the scheduled trial date at the time the original death notice was filed. When the district court continues the trial date for an additional period of time, the analysis logically focuses on whether the defendant has a "reasonable time" before the actual trial date to prepare. "[T]here is nothing in § 3593 that restricts courts to counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." Pet. App. 25a-26a. And given the manifest purpose of the reasonable notice requirement to provide the defendant with sufficient time to prepare for a capital trial, nothing in the Act prevents a district court from responding to a defendant's claim of untimely notice by continuing the trial date to ensure that his interests in adequate preparation thus are protected. *Id.* at 21a n.17, 27a.

Petitioner argues (Pet. 27) that the Act "implicit[ly]" mandates reference to the scheduled trial date at the time the death notice was filed because the scheduled trial date "is the only one known when the government

takes the action the statute directs." That argument incorrectly assumes that whether the defendant has received reasonable notice must be ascertained at the time the government files the notice. But the Act directs courts to consider the time period before "the trial," not the time period before "a scheduled trial date when the notice is filed." And, as discussed, in light of the provision's purpose to protect against the risk of lack of preparedness at trial, it would make no sense to ignore a rescheduled trial date.

3. Notwithstanding the existence of circuit conflicts on both the jurisdictional and the merits issue, the narrow issues implicated in the present petition do not warrant this Court's review. Indeed, if this Court were to resolve the jurisdictional issue in the government's favor (by finding the collateral order doctrine inapplicable), it would have no occasion to reach the merits of the question presented by petitioner.

a. As discussed, both the Fourth Circuit in *Ferebe* and the court of appeals below have held that a district court order denying a motion to strike the death penalty on grounds of untimeliness under the Act is subject to an immediate appeal as a collateral order.[7] After the petition was filed, the Second Circuit in *Robinson*, *supra*, issued an opinion reaching the opposite conclusion, holding that courts of appeals lack jurisdiction to review an order denying a motion to strike a death notice as untimely.

Despite that circuit conflict, this Court's review is unwarranted. To be sure, allowing interlocutory review of orders denying motions to strike the government's

[7] The First Circuit also has "assume[d] * * * without deciding that this is a correct interpretation of the collateral-order rule." *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (2006).

notice of intent to seek the death penalty as untimely can impede the sound implementation of the death penalty by "encourag[ing] defendants to file * * * challenges to § 3593(a) notices as soon as the notices are filed." *Ferebe*, 332 F.3d at 749 (Niemeyer, J., dissenting). An immediate appeal delays the trial, with the attendant costs to the criminal justice system. *MacDonald*, 435 U.S. at 853-854. The policy against piecemeal appeals in criminal cases has special force in capital cases, because delay imposes significant burdens on the victim's families and undermines society's interest in exacting retribution for and deterring the most serious crimes.

It nonetheless does not appear that this Court's intervention is warranted at this time. The court of appeals suggested that, given the court's conclusion "that continuances of a trial can cure any issue about whether a particular § 3593(a) notice is untimely, there should be little need for future interlocutory appeals as to a § 3593(a) notice." Pet. App. 21a n.18. The court also explained that it "may always decline collateral order review where the appeal is clearly frivolous." *Ibid.* Accordingly, the Eleventh Circuit's jurisdictional ruling appears unlikely to have significant adverse consequences for federal capital cases.

In the Fourth Circuit, the government has responded to *Ferebe* by filing death penalty notices in certain cases before the Attorney General has made a final decision whether to seek capital punishment. See *Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. of the Judiciary*, 109th Cong., 2d Sess. 8, 13-14 (2006) (statement of Margaret P. Griffey, Chief, Capital Case Unit, Criminal Div., Dep't of Justice). In cases in which the Attorney General decides not to seek the death penalty, the

notice is then withdrawn. *Ibid.* Accordingly, the government has thus far adopted procedures to protect itself against adverse effects from *Ferebe*, albeit through a procedural device that is not optimal.[8]

b. Only two courts have reached the merits issue, *i.e.*, whether the reasonableness of the government's notice must be assessed by reference to the scheduled trial in existence at the time of the government's filing of the notice. The Fourth Circuit in *Ferebe* looked to the "scheduled trial date" in existence "at the instant the Death Notice was filed." 332 F.3d at 737 & n.6; accord *United States* v. *Breeden*, 366 F.3d 369, 374 (4th Cir. 2004). By contrast, the Eleventh Circuit held that the reasonableness of the government's notice is not frozen at the time of the filing of the government's notice, and that district courts can respond to a defense objection of

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[8] Although Section 3593(a) requires only that "the attorney for the government believe[]" that a sentence of death is warranted, and requires only that attorney to file a notice, 18 U.S.C. 3593(a), decisions to seek the death penalty in the federal system are made pursuant to the so-called "Death Penalty Protocol," which was promulgated by DOJ shortly after enactment of the FDPA and now appears in Title 9 of the *United States Attorneys' Manual* (June 2001) (*USAM*). Under the Protocol, a U.S. Attorney must initially decide whether to charge a defendant in his district with a capital-eligible offense. Once a defendant is charged with such an offense, the U.S. Attorney must make a detailed submission to DOJ that includes a recommendation for or against seeking the death penalty. *USAM* § 9-10.040. The submission is reviewed by the Attorney General's Review Committee on Capital Cases, which makes its own recommendation, but not before providing defense counsel with an opportunity to make a submission and to "present to the Committee the reasons why the death penalty should not be sought." *Id.* § 9-10.050. The Attorney General then makes the final decision whether or not to seek capital punishment, based on standards that track the factors a jury is required to consider under the FDPA. *Id.* §§ 9-10.050, 9-10.080; 18 U.S.C. 3591-3593.

untimeliness by extending the trial date. Pet. App. 21a n. 18, 26a-28a.[9]

Notwithstanding the conflict on the issue, this Court's review in this case is not warranted. Only two circuits have decided the issue and as discussed above, the government has adapted to the *Ferebe* decision with procedures to protect against adverse results. It is therefore not clear that defendants in any circuit will prevail on claims of untimely notice, regardless of the legal test applied. Further developments may clarify whether the conflicting legal standards lead to disparate results.

In any event, this case is not an ideal vehicle to decide the issue for two reasons. First, as the district court concluded (Pet. App. 42a-47a), the death penalty notice in this case was timely even using April 18 as the date of the trial. The two-month period between the February 18 filing of the death penalty notice and the scheduled April 18 trial date was objectively reasonable under the circumstances.[10] The parties began treating this case as a likely capital prosecution from the outset. *Id.* at 4a. Petitioner retained experts, an investigative firm, and a mitigation specialist well before the govern-

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[9] As petitioner also observes, Pet. 20, the First Circuit in *Ayala-Lopez*, 457 F.3d at 108, did not decide whether a trial court may postpone the trial in response to a defense claim of untimely notice but the court of appeals did express its skepticism about the Fourth Circuit's holding in *Ferebe* that prejudice is irrelevant to the inquiry whether the government's notice was reasonable. *Ibid.* (assuming "*dubitante*" that prejudice at trial is not required under Section 3593(a)).

[10] Contrary to petitioner's assertion (Pet. 17), the court of appeals did not state or suggest that the notice "was likely untimely" based on a trial date of April 18. Pet. 17. Indeed, the court of appeals "expressly [did] not reach the issue." Pet. App. 28a n.29.

ment filed its notice. *Id.* at 5a. He had the benefit of two experienced capital defense attorneys even before the government charged petitioner with murder. *Ibid.* And the October 2004 superseding indictment gave petitioner actual notice of the statutory aggravators and culpability factors on which the government intended to rely. *Id.* at 5a-6a.

Regarding the nature of the charges and alleged aggravators, the three capital counts alleged in the second superseding indictment all stem from the same discrete set of facts—the shooting death of Deputy Sheriff Fatta—and are "rather basic." Pet. App. 44a. The October 2004 superseding indictment gave petitioner actual notice of the statutory aggravators and culpability factors that were later alleged in the notice. Those factors, which track the language of the FDPA, are "reflective of the same facts that are in the homicide charges themselves." *Id.* at 45a. Two of the four non-statutory aggravating factors (obstruction of justice and contemporaneous convictions) also involve the facts underlying other counts of the October 2004 indictment, and there is no indication in the record that any additional investigation required by the other two factors (future dangerousness and victim impact) could not have been completed in two months. When the death penalty notice was filed, moreover, discovery was "mostly complete from the government's side." *Id.* at 46a. Under those circumstances, even if the Fourth Circuit's test were applied, the filing of the death penalty notice two months before the April 11 trial date could be found reasonable. *Ferebe*, 332 F.3d at 737 (reasonableness turns

on, *inter alia*, "the status of discovery in the proceedings").[11]

Second, although the court below concluded that trial courts may cure otherwise unreasonable death notices by extending the trial date, Pet. App. 21a n. 18, 26a-28a, the trial court in this case continued the trial date to August 29 not to cure any perceived unreasonableness in the timing of the government's notice, but "for a variety of reasons unrelated to the timing of the Death Notice." *Id.* at 41a. The court explained that the trial needed to be extended because of pending motions filed by the defense, as well as because of the defendant's failure to disclose experts, including experts who would opine on petitioner's defense to the killing of the officer based on AIDS dementia. *Id.* at 39a-40a. Thus, the district court's extension of the trial date for reasons independent of the government's notice makes this case of

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[11] As petitioner notes (Pet. 14 n.3), the district court in *Ferebe* determined on remand that the death notice was filed 39 days before trial and ruled that, under the circumstances, 39 days was not a "reasonable time before the trial." See *United States* v. *Ferebe*, No. CRIM L-97-0329, 2005 WL 1429261, at *8 (D. Md. June 16, 2005). But, in contrast to the situation here, the parties in *Ferebe* had ceased trial preparation several months before the scheduled trial date because of a tentative plea agreement that would have resulted in a life sentence. 332 F.3d at 725-726; *id.* at 742 (dissenting opinion); 2005 WL 1429261, at *2-*4. Moreover, "discovery pertinent to the sentencing phase had not yet begun," the government had not provided the defendant with victim impact statements, and the defense had not developed psychiatric testimony on dangerousness. *Id.* at *7. Similarly, while the jury questionnaire in the instant case was complete more than a week before the April 18 scheduled trial date (Pet. App. 14a-15a), the district court in *Ferebe* found that the questionnaire could not have been completed in time. 2005 WL 1429261, at *3. In short, there was much more preparation remaining to complete in *Ferebe* with little more than half the time available here.

potentially limited value for addressing the broader (and more significant) question: whether district courts can cure otherwise untimely notices by continuing the trial date.

c. Finally, petitioner is not well positioned to argue that there is a pressing need for this Courts' resolution of the two conflicts in the circuits. He prevailed below on the jurisdictional issue, and his interlocutory appeal has already delayed the trial by a considerable period of time beyond even the continued trial date of August 29, 2005, thereby potentially hindering the government's ability to try petitioner. Moreover, even were petitioner correct that the April 18 trial date were the relevant focal point, he cannot claim any actual prejudice to his ability to defend against capital charges, given the substantial delay entailed by the appellate process. At the same time, petitioner remains free to contest the court of appeals' legal holding in this case after entry of final judgment, assuming that petitioner is convicted and sentenced to death, where a fuller record could assist this Court in conducting any appropriate analysis of prejudice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

STEVEN L. LANE
Attorney

FEBRUARY 2007

No. 06-672

IN THE

Supreme Court of the United States

KENNETH P. WILK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM D. MATTHEWMAN
SEIDEN, ALDER & MATTHEWMAN
2300 Glades Rd.
West Tower—Ste. 340
Boca Raton, FL 33341
(561) 416-0170

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

J. RAFAEL RODRIGUEZ
LAW OFFICES OF J. RAFAEL RODRIGUEZ
6367 Bird Rd.
Miami, FL 33155
(305) 667-4445

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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REPLY FOR PETITIONER

The government concedes that this case presents not one but *two* express circuit splits relating to the administration of the federal death penalty. See Gov't Opp. 11, 17. Its arguments for nonetheless opposing review are unpersuasive. The government itself has stressed the importance of the issues presented. Its purported concerns over whether this case is an "ideal vehicle" (*id.* at 20) are insubstantial. And the "procedural device" it has adopted in an effort to mitigate the circuit splits' impact (*id.* at 18-19) is so patently contrary to the terms of the Federal Death Penalty Act as to underscore the need for this Court's review.

I. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT DIVIDE THE CIRCUITS

A. The Conflicts Are Square and Fully Developed

The government acknowledges, as it must, that both questions presented in this case "implicate disagreements in the circuits." Gov't Opp. 11; see *id.* at 17 (conceding the "existence of circuit conflicts on both the jurisdictional and the merits issue"). With respect to jurisdiction, the Fourth Circuit has held that "orders denying motions to strike Death Notices as untimely filed are immediately appealable." *United States* v. *Ferebe*, 332 F.3d 722, 726 (4th Cir. 2003); accord *United States* v. *Breeden*, 366 F.3d 369, 372-373 (4th Cir. 2004). The Eleventh Circuit has "agree[d]" with that holding. Pet. App. 21a. The Second Circuit has "reach[ed] the opposite conclusion," Gov't Opp. 17, refusing "to align [itself] with other courts of appeals that have held that such denials are immediately appealable," *United States* v. *Robinson*, 473 F.3d 487, 490-492 (2d Cir. 2007).

The government likewise concedes that there is a circuit split on the merits issue—how to determine whether a death notice was filed a "reasonable time before the trial" as required by 18 U.S.C. § 3593(a). Gov't Opp. 19-20. The Fourth Circuit compares the date the notice was filed to the "scheduled trial date" in existence "at the instant the Death

Notice was filed." *Ferebe*, 332 F.3d at 737 & n.6. In the decision below, the Eleventh Circuit rejected that approach as "not . . . persuasive" and held that courts are *not* limited to "counting only the days between the Death Notice and a scheduled trial date at the time of the filing of the Death Notice." Pet. App. 25a-27a & n.28. As the government concedes, moreover, the First Circuit has also "express[ed] its skepticism about the Fourth Circuit's [merits] holding in *Ferebe*." Gov't Opp. 20 n.9 (citing *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (1st Cir. 2006)).

Those two square circuit conflicts are more than sufficient reason to grant review. This Court often grants certiorari in cases raising even a *single* split of comparable dimensions. See, *e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005) (2-1 split); *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50 (2004) (1-1 split); *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004) (1-1 split); *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581 (2004) (2-1 split); *Boeing Co.* v. *United States*, 537 U.S. 437 (2003) (1-1 split). This case presents *two* such conflicts, and it arises in a context—the administration of the federal death penalty—where the need for uniformity is especially acute. See FACDL Amicus Br. 4-9.

The government's insistence that only a "handful" of circuits have addressed these issues (Opp. 11) is thus beside the point. When there is a clear conflict among the circuits, the pertinent question is not how many cases line up on each side. Rather, it is whether the conflict should be resolved immediately or allowed to "percolate" in the hope that further consideration by other courts will clarify the issues or obviate the need for review. Where the issues are already fully vetted and there is no reasonable possibility that the circuit split will resolve itself, delay serves no purpose; it merely puts off this Court's inevitable review and causes needless uncertainty and litigation in the meantime.

Here, further dialogue among the lower courts will not clarify the issues. Both issues have already been debated at great length—in Judge Luttig's and Judge Niemeyer's opinions in *Ferebe*, 332 F.3d at 726-737, 740-753; in the subsequent *en banc* proceedings, 344 F.3d 437, 438-439 (4th Cir. 2003); in Judge Wilkins' opinion in *Breeden*, 366 F.3d at 372-375; in the Eleventh Circuit's decision below, Pet. App. 20a-30a; in the Second Circuit's decision in *Robinson*, 473 F.3d at 490-492; in the First Circuit's opinion in *Ayala-Lopez*, 457 F.3d at 108-109; and in the "flurry" of conflicting district court decisions (at least seven published opinions so far), Pet. 18-20. Delaying review so other courts can pick sides would not sharpen the issues; there is nothing new left to write. And the circuit split clearly will not resolve itself—the Fourth Circuit has turned down repeated opportunities to reconsider *Ferebe*. Delaying review will produce nothing but unnecessary confusion and litigation.

The government has successfully urged review in comparable cases. In *Heinz*, only two circuits had weighed in on the question presented (with arguable *dicta* in a third). See Gov't CVSG Br. in No. 02-891, at 6-7 & n.2 (Oct. 2003). Rejecting the respondent's argument that the Court should "delay addressing the issue . . . until other courts have considered the matter," the government urged that the case presented a "square conflict" on a "question of law" that would not be clarified by further opinions; that the issue had "substantial recurring importance"; and that "the need to ensure uniformity in the administration of . . . national legislation" warranted immediate review. *Id.* at 15-16; see also Pet. in *Koons Buick*, No. 03-377, at 13 (Sept. 4, 2003) (successfully urging review of 1-1 split because issue was a "crisp and clear one which will not be aided by further percolation"). Review of the *two* circuit splits presented by this case is appropriate for precisely the same reasons here.

B. The Issues Are Important and Recurring

The issues presented have tremendous practical significance. The government itself has argued as much: When it sought rehearing *en banc* in *Ferebe*, it told the Fourth Circuit that the issues were of "exceptional importance." Gov't Pet. for Rehearing En Banc at 2, No. 01-22 (4th Cir. July 30, 2003). Judge Niemeyer agreed that the issues were "important" and already "changing pretrial proceedings in capital cases in a significant way"; he voted against rehearing only because he thought "immediate review by the Supreme Court would be a more efficient resolution of the debate." 344 F.3d at 438. The government has also urged Congress to enact legislation to overturn *Ferebe*, invoking the issues' importance to the administration of the death penalty. Pet. 22. The government's current assertion that the issues are somehow "narrow" thus rings hollow.

The government also claims that review is unwarranted because it has adapted to the merits split: It now files death notices in the Fourth Circuit even *before* the Attorney General has decided whether to seek the death penalty. Gov't Opp. 18-19. It describes that procedure as "not optimal," *id.* at 19, but that is an understatement. The Federal Death Penalty Act requires the government to provide notice that it "*will* seek the sentence of death," 18 U.S.C. § 3593(a)(1)—not that it "*might* seek the sentence of death" or that it "*will decide whether* to seek the sentence of death at a later date." Only the Attorney General can decide whether the government *will* seek the death penalty. U.S. Attorneys' Manual § 9-10.020. The government's strategy of filing false death notices thus flouts the express terms of the Act.

For that reason, at least one court has effectively rejected the government's strategy already. In *United States* v. *Rosado-Rosario*, No. 97-049, 1998 WL 28273 (D.P.R. Jan. 15, 1998), the court struck a death notice that had been filed "'as a protective measure'" before the Attorney General's decision. *Id.* at *2-4. Absent Attorney General approval,

the court held, the notice "was, for all purposes, a hoax." *Id.* at *2. Thus, far from protecting the government's interests, the government's strategy only threatens *more* litigation over the validity of its death notices.

The strategy also undermines the statutory design. Defending a capital case requires extraordinary expenditures of time, money, and effort; capital defense counsel must ration their limited resources. See FACDL Amicus Br. 10-13. It is thus crucial for counsel to know whether the government actually intends to seek the death penalty. Section 3593(a)'s requirement of a formal death notice accomplishes that objective—it encourages the sober consideration expected in matters of this magnitude. The government's strategy of filing sham death notices based on a mere expectancy that it *might* pursue the death penalty has the opposite effect: It diverts scarce resources from cases where they are needed, inflicts needless anxiety on defendants, and wastes the time of courts and counsel alike.[1]

The government has conceded the inadequacy of its strategy before. When the Chief of the Department of Justice's Capital Case Unit testified before Congress in March 2006, she acknowledged that the government had adapted to *Ferebe* by filing "protective" death notices. See *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong., 2006 WLNR 5404524 (Mar. 31, 2006). *Despite that adaptation*, she "strongly support[ed]" legislation overruling *Ferebe*, citing the Department's "commit[ment] to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography." *Ibid.* The government fails to explain why that commitment to uniformity does not similarly demand review here.

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[1] The strategy also has the potential to coerce guilty pleas from defendants misled into believing they will face the death penalty. Cf. *United States* v. *Jackson*, 390 U.S. 570, 582-583 (1968).

In any event, this Court should not assess the importance of the questions presented based solely on whether they interfere with the government's ability to prosecute. If the Fourth and Eleventh Circuits are correct that defendants have a right to appeal immediately from a refusal to strike a death notice, defendants in the Second Circuit will be wrongfully forced to suffer the anxiety and expense of a capital trial in order to vindicate their rights.[2] And if the Fourth Circuit is correct that timeliness depends on the scheduled trial date, defendants in the Eleventh Circuit will be wrongfully sentenced to a penalty the government has no statutory right to impose. Those interests too highlight the importance of the issues in this case.

C. The Government's Substantive Arguments Are Beside the Point

Half the government's argument is devoted not to the propriety of certiorari but to its substantive positions on the questions presented. Gov't Opp. 11-17. The government thus spends nearly five pages arguing that the denial of a motion to strike a death notice is not immediately appealable. *Id.* at 11-16. That is a strange basis for urging the Court to *deny* review of a decision holding that such notices *are* immediately appealable. The government made those same arguments to the Fourth Circuit in *Ferebe* and *Breeden*, to the Eleventh Circuit below, and to the First Circuit in *Ayala-Lopez*; three of those cases rejected its position

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[2] The government claims that the Eleventh Circuit's jurisdictional ruling should not "have significant adverse consequences for federal capital cases," citing that court's observations that there would be "'little need for future interlocutory appeals'" given its merits ruling, and that courts may decline review of "'clearly frivolous'" appeals. Gov't Opp. 18 (quoting Pet. App. 21a n.18). But the Eleventh Circuit was referring only to future appeals *in that circuit*. Its reasoning has no bearing in circuits that follow *Ferebe* or that have not yet addressed the issue—*i.e.*, virtually every other circuit. Capital defendants in those circuits will continue to file interlocutory appeals, and given the circuit split, few will be "clearly frivolous."

and the fourth assumed jurisdiction *arguendo*. If all those courts are exercising jurisdiction Congress denied them, that is a reason to *grant* the petition—not to deny it.

On the merits issue of how to measure the timeliness of a death notice, the government contends that, because the *purpose* of the notice is to ensure adequate time to prepare for trial, a notice should not be struck if prejudice can be avoided by continuing the trial. Gov't Opp. 16-17. But that argument "'abstracts from the right to its purposes, and then eliminates the right.'" *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006). The *right* secured by § 3593(a) is the right to receive notice by a statutorily prescribed date—not the right to adequate time to prepare. We have not, as the government contends, "*assume[d]* that whether the defendant has received reasonable notice must be ascertained at the time the government files the notice." Gov't Opp. 17 (emphasis added). We have simply *concluded* that from the fact that Congress does not normally direct a party to perform an act at a time that cannot be ascertained until *after* the act is supposed to have been performed. See Pet. 27-29. The statute requires the government to provide notice a reasonable time before trial; it does not require courts to schedule trial a reasonable time *after* the notice. In any event, at most the government has shown that the issue is debatable. That, again, is a reason to *grant* review, not a reason to leave parties and courts mired in confusion.

II. THIS CASE IS AN EXCELLENT VEHICLE

A. The Reasonableness of Two Months' Notice Is Not Relevant to the Questions Presented

The government also urges that this case is not an "ideal vehicle" because even the two months between the filing of the death notice and the *scheduled* trial date then in place was sufficient. Gov't Opp. 20-22. But the government nowhere explains how that dubious contention would impede this Court's review. The Eleventh Circuit did not reach the factbound issue of whether two months' notice was suffi-

cient, because it held that the *rescheduled* trial date was the one that mattered. Pet. App. 28a n.29; Gov't Opp. 20 n.10.[3] The correctness of *that* holding—or *Ferebe*'s contrary holding—is the issue before this Court. If the Court affirms, the adequacy of two months' notice would be irrelevant; if it reverses, the adequacy of two months' notice would at most be an issue for the Eleventh Circuit on remand. This Court normally does not review issues not reached by the court of appeals. See *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999).

In any event, two months' notice was plainly inadequate. Death notices are filed an *average* of 11 months before trial. Pet. 8. *Three* courts have found notices inadequate in comparable circumstances; the government attempts to distinguish one case but does not even bother with the other two. Compare Pet. 16 with Gov't Opp. 22 n.11. And it cites *no* other case that has found two months' notice sufficient.

The government attempts to downplay the charges in this case as "rather basic." Gov't Opp. 21. Even if that were true—and it is not[4]—Wilk's *defense* to those charges was anything but basic. Wilk—who is hearing impaired and suffers from AIDS dementia—contends he mistook the officers for intruders. Pet. 3. That defense will require extensive expert medical testimony, mental-health testimony, and crime-scene reconstruction to explain how that mistake occurred. Moreover, merely to avoid being *constitutionally*

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[3] The government quibbles with our description of the Eleventh Circuit's opinion on this point, Gov't Opp. 20 n.10, but the petition accurately stated that the Eleventh Circuit "did not dispute" Wilk's contention that the notice was likely untimely under *Ferebe*. Pet. 17; see Pet. App. 28a n.29 ("assuming *arguendo* that the Death Notice might have been otherwise problematic without the continuance").

[4] The district court opined that the *homicide* charges were "rather basic," but it admitted that other charges involved a "degree of intricacy." Pet. App. 44a. Those other charges were critical because the government sought to rely on any conviction for them as an aggravating factor in support of the death penalty. *Id.* at 12a.

ineffective (to say nothing of being good), Wilk's counsel must thoroughly investigate Wilk's upbringing and other circumstances to root out potential mitigating evidence. See *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003). In light of such burdens, it is not surprising that defense counsel take *16 times* as long to prepare in capital cases. See FACDL Amicus Br. 12. Two months was not remotely enough.

B. The District Court's Stated Reasons for Continuing the Trial Will Not Impede Review

The government also argues that this case is not "ideal" because the district court continued the trial for reasons unrelated to the death notice. Gov't Opp. 22-23. But that too is irrelevant. Under the Eleventh Circuit's rule, the timeliness of a death notice depends on the *rescheduled* trial date, regardless of why trial was rescheduled. Pet. App. 25a-29a. Under the Fourth Circuit's rule, timeliness depends on the *scheduled* trial date in place when the notice was filed, regardless of the reason for any subsequent continuance. Pet. 18 n.6. This case thus perfectly presents the key point of disagreement between those circuits: whether the statutory phrase "reasonable time before the trial" refers to the *scheduled* trial date when the notice is filed or the later-established date when trial ultimately begins.

This Court could construe the statute to mean that the *scheduled* trial date always governs (the Fourth Circuit's rule). The Court could construe it to mean that the *rescheduled* trial date always governs (the Eleventh Circuit's rule). Or the Court could construe it to mean that the rescheduled trial date governs *if* trial is continued for reasons unrelated to the death notice (the trial court's rule). Any of those interpretations would be equally binding, and any one of them would resolve the circuit conflict and restore uniformity under the Federal Death Penalty Act. There is thus no merit to the government's suggestion that this case has "potentially limited value." Gov't Opp. 23.

C. The Delay Caused by Wilk's Appeal Is Irrelevant

Finally, the government contends that Wilk is "not well positioned" to seek review because the delay entailed by his interlocutory appeal alleviated any prejudice. Gov't Opp. 23. But *Ferebe* expressly holds that an untimely death notice must be struck "regardless of whether [the defendant] will or will not be, or was or was not, prejudiced." 332 F.3d at 732 (emphasis omitted). The government's claim that Wilk is not "well positioned" to complain simply assumes that *Ferebe* is wrong and that the government's own "no harm, no foul" interpretation of the statute is correct. Wilk need only be well positioned to press *his own* interpretation of the statute—not the *government's*. In any event, the delay did not alleviate the prejudice: The trial court stayed all proceedings pending appeal, thus preventing Wilk from filing motions or seeking disbursements necessary to develop his defense. See Order Removing Case from Trial Calendar and Staying All Proceedings (Aug. 5, 2005) (Dist. Ct. Docket #544).

The possibility of a post-trial appeal (Gov't Opp. 23) is likewise irrelevant. Courts permit interlocutory appeals in these cases *precisely because* a final appeal is *inadequate* to protect the defendant's rights. See Pet. App. 21a; *Ferebe*, 332 F.3d at 728-730. And a "fuller record" would not "assist this Court in conducting any appropriate analysis of prejudice." Cf. Gov't Opp. 23. Under *Ferebe*, *no* analysis of prejudice is appropriate. 332 F.3d at 732. The question presented here is whether *Ferebe* is correct; not whether Wilk would prevail even if it were not. Delaying review until after trial will thus achieve nothing—except to make this case a *worse* vehicle by preventing the Court from settling the split over the important jurisdictional issue.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM D. MATTHEWMAN
SEIDEN, ALDER &
MATTHEWMAN
2300 Glades Rd.
West Tower—Ste. 340
Boca Raton, FL 33341
(561) 416-0170

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

J. RAFAEL RODRIGUEZ
LAW OFFICES OF J. RAFAEL
RODRIGUEZ
6367 Bird Rd.
Miami, FL 33155
(305) 667-4445

Counsel for Petitioner

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In the Supreme Court of the United States

KENNETH WILK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GIOVANNA SHAY
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

PAULA SAUNDERS
MIKE UFFERMAN
FACDL Amicus Committee
P.O. Box 1528
Tallahassee, FL 32302

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Florida Association of Criminal Defense Lawyers ("FACDL") is a non-profit organization with a membership of over 1,500 attorneys and 23 chapters throughout the state of Florida.[1] The FACDL's members all are practicing criminal defense attorneys, and many focus on representing defendants in capital cases.

The question presented in this case relates directly to the role of defense counsel in capital cases, and the FACDL has substantial expertise in that area. The correct construction of the Federal Death Penalty Act's reasonable notice requirement has important practical implications for the proper resolution of capital criminal cases, and the issue potentially affects numerous federal capital prosecutions. Particularly because its members practice in the Eleventh Circuit, the FADCL has a strong interest in the appropriate resolution by this Court of this significant question.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the requirement of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*, that the government "shall, a reasonable time before trial * * *, sign and file with the court, and serve on the defendant," notice of its intent to seek the death penalty. 18 U.S.C. § 3593(a). The Eleventh Circuit held in this case that the timeliness of the notice must be determined by assessing the period between its filing and the date the trial begins, and that an untimely

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of this Court.

notice therefore may be rendered timely simply by delaying the trial. It expressly rejected the contrary conclusion of the Fourth Circuit that the relevant time period is the interval between the filing of the notice and the then-scheduled trial date, even if the trial is later rescheduled.

This question regarding the proper construction of Section 3593(a) has substantial practical importance, and review of the issue now by this Court is therefore warranted, for three interrelated reasons. First, the Eleventh Circuit's interpretation of Section 3593(a) inevitably will produce inconsistent administration of the federal death penalty. This Court has long recognized that the law abhors capriciousness in the application of the death penalty. "[A] matter so grave as the determination of whether a human life should be taken or spared" must be decided carefully and consistently without reference to arbitrary factors such as jurisdiction. *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976)). "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982).

The disagreement among the lower courts regarding Section 3593(a) undercuts the reliability and rationality of the federal death penalty. The Fourth Circuit has interpreted Section 3593(a)'s mandate of a "reasonable" period of time between the government's notice of intent to seek the death penalty and the trial to require that reasonableness be assessed on the basis of the scheduled trial date *at the time the notice was filed*, and would strike any notice filed unreasonably close to that trial date. *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003). In the present case, the Eleventh Circuit interpreted the statute to allow the district court to cure an untimely death notice by delaying the trial date, in effect ensuring that *every* death notice, no matter how close to the scheduled trial date it is filed, could be rendered reasonable by simply granting a delay. The Second Circuit in *United States* v. *Robinson*, 473 F.3d 487 (2d Cir. 2007) held that de-

nials of motions to strike a death notice are not immediately appealable, so the issue may not be addressed by an appellate court until after the trial.

As a result of these differing interpretations, defendants indicted for the same crime who receive an untimely notice of intent to seek the death penalty *may* still be eligible for the death penalty in the Eleventh Circuit but *not* in the Fourth, based on no more than the federal jurisdiction in which they are charged. And in the Second Circuit, district courts may adopt differing constructions of Section 3593(a), so that the rule applied to a defendant depends upon the particular district judge assigned to his case.

Second, in every circuit but the Fourth Circuit, defendants and their attorneys cannot be certain whether or not the government will seek the death penalty until the very day their trials begin. Because specialized death penalty defense attorneys are invariably requested and assigned at the outset of potential capital cases, this uncertainty needlessly extends the period of time during which capital defense resources are consumed in preparing for trials that in the end turn out to be *non*-death cases. It is well documented that defense attorneys already have to sacrifice the thorough representation of some defendants by rationing their limited resources. The unnecessary expenditures of scarce resources resulting from the decision below thus deprives defendants in capital cases of funds needed for a vigorous defense.

Third, the Eleventh Circuit's rule invites potentially prejudicial delay of trials, further threatening to impede the fair and effective use of death defense resources. The rule allows the government to seek pre-trial delay in order to render reasonable what otherwise would be an untimely notice of intent to seek the death penalty. By extending the pretrial period – and stretching investigative resources even thinner – this delay reduces the effectiveness of these very limited resources.

This Court should therefore grant review to eliminate unacceptable arbitrariness in the administration of the federal death penalty and to prevent the waste of resources that imperils the effective defense of individuals put on trial for their lives.

ARGUMENT

THE PROPER INTERPRETATION OF THE FEDERAL DEATH PENALTY ACT'S REASONABLE NOTICE REQUIREMENT IS A QUESTION OF SUBSTANTIAL PRACTICAL IMPORTANCE WARRANTING THIS COURT'S IMMEDIATE ATTENTION.

A. The Divergent Approaches Of The Lower Courts Produce Unacceptable Arbitrariness In The Administration Of The Federal Death Penalty.

The conflicting decisions of the lower courts regarding Section 3593(a) inevitably will lead to arbitrary application of the federal death penalty, with the decision whether a defendant will face the death penalty turning entirely on the circuit in which the prosecution takes place. Because this Court has long held that the death penalty must be administered fairly and consistently, the Court should grant review to remedy this geography-based arbitrariness in the application of the federal death penalty.

The cornerstone of this Court's death penalty jurisprudence is that "a matter so grave as the determination of whether a human life should be taken or spared" must be decided carefully and consistently. *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). As the Court, speaking through Justice Thomas, observed in *Jones* v. *United States*, 527 U.S. 373 (1999), "the Eighth Amendment requires that a sentence of death not be imposed arbitrarily." *Id.* at 381 (citing *Buchanan* v. *Angelone*, 522 U.S. 269, 275 (1998)). Accordingly, "capital punishment [must] be imposed fairly, and with reasonable

consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982).

The reason that consistency and fairness are constitutionally indispensable in the context of the death penalty is that "the penalty of death is qualitatively different from any other sentence [and] this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (citation and internal quotation marks omitted). "[T]here is no doubt that death is different." *Ring* v. *Arizona*, 536 U.S. 584, 605-06 (2002) (citation omitted). Accordingly, the death penalty necessitates stricter scrutiny and defendants are afforded greater protections than are available in other contexts. See, *e.g.*, *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) (recognizing constitutional right to expert witnesses regarding mental state in capital trials).

If identical cases arise in the Fourth Circuit and in the Eleventh Circuit and the prosecutor in each case files an identically untimely notice of intent to seek the death penalty, the defendant in the Fourth Circuit will not face the death penalty (under the holding of *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003)), while the similarly situated defendant in the Eleventh Circuit will continue to face death, albeit with a delayed trial date, under the decision in the present case. Based on nothing more than geographic location, the defendant in the Fourth Circuit will be spared the death penalty while the similarly situated defendant in the Eleventh Circuit may still be executed.

Moreover, the Second Circuit's holding that an order denying a motion to strike a death notice for violating Section 3593(a) "fails to qualify as a collateral order" (*United States* v. *Robinson*, 473 F.3d 487, 492 (2d Cir. 2007)) means that the applicable standard in that circuit will be left to individual district courts – thus multiplying the arbitrariness based on geographic location. In *United States* v. *McGriff*, 427 F. Supp. 2d 253 (E.D.N.Y. 2006), *appeal dismissed for lack of*

jurisdiction sub nom. United States v. *Robinson*, 473 F.3d 487 (2d Cir. 2007), the district court observed that "the existing cases divide" on the proper interpretation of the provision (*id.* at 266), and declined to hold that "an untimely Death Notice cannot be rescued by delaying the trial date." *Id.* at 268 (citation omitted). The district court also rejected the "equally extreme" rule that "striking an untimely death-penalty notice is never appropriate" (*ibid.*), suggesting that the remedy should be based on a number of factors applied on a case-by-case basis. Another court in the same district has indicated a different view. See *United States* v. *Pepin*, 367 F. Supp. 2d 315, 318 (E.D.N.Y. 2005) (suggesting that a court may "effectively address the concerns raised by a motion to strike a death notice as untimely by postponing the trial").

District courts in other circuits also are grappling with the issue. In *United States* v. *Gomez-Olmeda*, 296 F. Supp. 2d 71 (D.P.R. 2003), the court struck a death penalty notice filed fewer than twenty-four hours before a defendant was scheduled to plead guilty. *Id.* at 87. The court agreed with the Fourth Circuit that the determination of whether a death notice was filed a "reasonable time before the trial" should be addressed prior to trial. However, like the courts in *Pepin* and *McGriff*, the court in *Gomez-Olmeda* refused to hold, as have several district courts in the Fourth Circuit post-*Ferebe*,[2] that a continuance could *never* be an appropriate remedy for an untimely death notice. *Gomez-Olmeda*, 296 F. Supp. 2d at 87. See also *United States* v. *Roman*, 371 F. Supp. 2d 36 (D.P.R. 2005) (striking a death notice that was unreasonably delayed, but refusing to hold that such a remedy is the exclusive cure for an untimely death notice).

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[2] *United States* v. *Cuong Gia Le*, 316 F. Supp. 2d 343 (E.D. Va. 2004); *United States.* v. *Hatten*, 276 F. Supp. 2d 574 (S.D. W. Va. 2003).

Disagreements among the lower courts that make geographic location alone determinative of whether the federal death penalty is available create a regime that is arbitrary and irrational. Not surprisingly, this Court has been vigilant in its review of conflicting interpretations of federal law when the statute determines whether a defendant is eligible for or ultimately receives the death penalty. In *Jones*, for instance, this Court granted certiorari to resolve whether, under the Federal Death Penalty Act, the jury's failure to reach a unanimous verdict recommending either a death sentence or life imprisonment creates "good cause" for discharge of the jury. 527 U.S. at 380-82.

Similarly, the Court routinely reviews conflicting interpretations of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") to ensure that federal habeas standards are consistent throughout the nation. Last term the Court resolved whether courts may raise *sua sponte* the statutory limitations created by AEDPA. *Day* v. *McDonough*, 126 S. Ct. 1675 (2006). See also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 410 (2005) (resolving conflict among courts of appeals as to whether an untimely state post-conviction petition rejected by the state court is "properly filed" for purposes of AEDPA); *Johnson* v. *United States*, 544 U.S. 295 (2005) (resolving disagreement among courts of appeals as to whether vacatur of prisoner's prior state convictions could renew the one year period of limitations for attacking a federal sentence under AEDPA).

Ensuring that the courts of appeals consistently interpret federal statutes that can have an outcome-determinative effect on the imposition of capital punishment is essential to exclude arbitrariness from the federal death penalty system. This Court should grant certiorari here because the lower courts' inconsistent decisions with respect to Section 3593(a) undercut the fair and consistent application of the federal death penalty.

By granting review in this case, moreover, the Court may address both of the issues that divide the courts of appeals. First, it can determine the appealability under the collateral order doctrine of district court orders denying motions to strike death notices (because that jurisdictional question is necessarily before the Court). The Second Circuit's holding in *Robinson* that such orders are not immediately appealable conflicts with the decision of the Fourth Circuit in *Ferebe* (see 332 F.3d at 726-30) and the Eleventh Circuit here (see Pet. App. 1a-2a). See also *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (1st Cir. 2006) (assuming without deciding that denial of a motion to strike pursuant to Section 3593(a) is a collateral order).

This Court has held that a court of appeals may entertain an appeal of a district court's interlocutory order if the order "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Sell* v. *United States*, 539 U.S. 166, 176 (2003) (quotation marks and alterations omitted). In *Ferebe*, the Fourth Circuit explained that "[t]here is no question but that the district court's order [denying the motion to strike the death notice] fully disposes of the issue to which it is directed," and that the issue is separate from the merits of the underlying criminal action. *Ferebe*, 332 F.3d at 726-27. As to the third element, Section 3593(a) "creates for defendants not merely the right not to be convicted and sentenced without adequate time to prepare, but also the right not to stand trial for one's life absent the same;" therefore, vacating a sentence and remanding *after* trial "does not protect (nor, for that matter, even remedy the denial of) the right not to be forced to endure a capital trial except upon reasonable notice that one will be required to do so." *Id.* at 730.

The Second Circuit disagreed with the last element of the Fourth Circuit's analysis in *Ferebe*, concluding that "§ 3593(a) does not create a right not to be tried." *Robinson*,

473 F.3d at 492. The Second Circuit reasoned that it could "review the district court's order--and the government's conduct--in the ordinary course, in the event [the defendant] is convicted and elects to appeal." *Ibid.*

That is the precise opposite of the view of the statute taken by the Fourth Circuit, which – speaking through Judge Luttig – explained in *Ferebe*:

> a post-trial assessment of prejudice to the accused * * * cannot possibly be correct. For such an analysis substitutes for the statutorily-mandated inquiry into the pre-trial, objective reasonableness of the time between issuance of the Death Notice and trial, a quite different, post-trial inquiry into the prejudice suffered by the accused as a result of the timing of the Death Notice – in effect a "harmless error" inquiry. This is to transform what was intended as a prophylactic statute into a mere remedial one, and to deny to the accused the right afforded by the statute, not merely to avoid sufferance of the punishment of death without adequate notice, but to avoid sufferance of trial for capital offense except upon adequate notice.

332 F.3d at 727.

Second, the Court can resolve the disagreement between the Fourth and Eleventh Circuits – and numerous district courts – regarding the proper interpretation of Section 3593(a), a disagreement discussed fully in the petition. The Court should grant the petition to restore uniformity to the administration of the federal death penalty with respect to this important issue.

B. Uncertainty About The Correct Legal Standard Squanders Scarce Defense Resources On Non-Capital Cases And Therefore Threatens To Impede The Ability Of Defendants In Capital Cases To Mount An Effective Defense.

Expanding the time period during which it is not certain whether a defendant may face the death penalty – the inevitable practical impact of the decision below – means that limited death penalty defense resources will be diverted from defendants who actually will be tried for their lives to defendants who *might*, but ultimately do not, face the death penalty. The Fourth Circuit's construction of the statute, by contrast, limits the period during which capital defendants are uncertain of whether the government will seek the death penalty and therefore conserves scarce capital defense resources for those defendants who actually are put on trial for their lives.

A recent report by the Judicial Conference of the United States found that "[j]udges generally report[] that prosecution resources in death penalty cases seem[] unlimited." Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, at § I(B)(5), May 1998, *available at* http://www.uscourts.gov/dpenalty/2TABLE.htm (hereinafter "JUDICIAL REPORT"). By contrast, defense attorneys often have to sacrifice the "thorough representation" of some defendants by "rationing" their limited resources. Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 Brandeis L.J. 207, 211(2003).

Under federal law, any person indicted for a capital offense may obtain additional government-provided resources and defense counsel "learned in the law applicable to capital cases." *See* Act of June 25, 1948, c. 645, 62 Stat. 814 (codified at 18 U.S.C. § 3005) (amended Sept. 13, 1994, Pub. L.

103-322, Title VI, § 60026, 108 Stat. 1982).[3] Defendants are not required to wait for the government to file a death notice in order to begin utilizing these resources to prepare for a death penalty trial. Specialized death penalty defense attorneys, who are authorized by law to receive compensation greater than regular appointed defense attorneys (see 21 U.S.C. § 848(q)), are therefore invariably requested and assigned at the outset of a case in which the United States Attorney is likely to seek the death penalty.[4]

Available data indicates that a defendant can never be certain whether the United States will seek the death penalty until the time for filing a death notice has expired. There are a substantial number of cases in which the United States Attorney requests the death penalty, but the Attorney General declines to approve the request.[5] And there are a substantial

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[3] One study estimates that approximately 90% of capital defendants are indigent. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 333 (Fall 1995). Defense costs in capital cases are therefore virtually always funded by the government.

[4] Failure to treat the case as a capital case until the expiration of the time for filing a death notice could inflict significant prejudice on a defendant, because evidence that is not relevant in a non-death case often is relevant in a death case. For example, delay in the investigation of sentencing considerations – especially investigation of mitigating factors such as the defendant's mental state – can harm the defendant because delay could mean that the evidence will no longer be fresh and could even be unavailable.

[5] The Attorney General makes the ultimate decision whether the government will seek the death penalty. See United States Department of Justice, United States Attorneys' Manual § 9-10.020. Between 1995 and 2000, United States Attorneys submitted 183 recommendations to seek the death penalty. The Attorney General ultimately declined to approve 24, or more than 13%, of those recommendations. See United States Department of Justice, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY,

number of cases in which the Attorney General overrules a United States Attorney's recommendation *not* to seek the death penalty.[6]

The longer that the government may delay its decision whether to seek the death penalty, the greater the amount of defense resources that will be misallocated to defendants who will not in fact face the death penalty – because each defendant's attorneys must prepare as if their client will be on trial for his life until the time for the government to request the death penalty has expired. Many millions of dollars therefore may be expended in preparing for capital trials that never occur because the government ultimately decides against seeking the death penalty – on average, a federal public defender spends 1,889 hours on a capital trial, *sixteen times more* than the average of 117 hours spent on a non-capital homicide case. *See* JUDICIAL REPORT at §§ I(A)(2), (B)(4). Defense resources are not unlimited, and this substantial diversion of funds means that fewer resources will be available to those individuals who actually end up facing the death penalty.

Sept. 12, 2000, *at* http://www.usdoj.gov/dag/pubdoc/dpsurvey.html.

[6] Between 2001 and 2003, the Attorney General overruled 33 of 286 recommendations of United States Attorneys not to seek the death penalty. *See* Memorandum from the Federal Death Penalty Resource Counsel, *Attorney General Ashcroft's Decisions Regarding the Federal Death Penalty* 3, July 17, 2003, *available at* http://www.capdefnet.org/pdf_library/81393.pdf. During this same period, the Attorney General nullified at least five plea agreements that United States Attorneys had executed with death-eligible defendants, transforming them into death penalty cases, at the surprise of even the United States Attorneys. John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When the U.S. Attorneys Recommend Against the Death Penalty*, 89 Va. L. Rev. 1697, 1698 (2003). See also Leigh Jones, *DOJ Is Quietly Rejecting Death Penalty Deals*, N.Y.L.J. (Feb. 7, 2003).

The disagreement among the lower courts creates considerable uncertainty regarding the time within which the government must file a death notice. That uncertainty exacerbates non-capital defendants' consumption of scarce capital defense resources. The Court should grant review to eliminate this uncertainty and the resulting diminution of resources available to effectively defend those individuals whose life actually is at stake.

C. The Delay Produced By The Eleventh Circuit's Approach Prejudices Defendants.

The Eleventh Circuit's rule also produces delay in the start of a capital trial – the delay that in the Eleventh Circuit's view renders reasonable an untimely notice of intent to seek the death penalty. That delay can prejudice defendants.

For example, funds available to indigent defendants for investigatory resources are already greatly constrained by federal statute. Section 222 of the USA PATRIOT Improvement and Reauthorization Act of 2006 sets capital defense teams' total investigative and expert budgets at just $7,500 for both the guilt and sentencing phases of trial. Pub. L. No. 109-177, 120 Stat. 192, 232 (codified at 18 U.S.C. § 3599). Defense counsel may exceed their budgets only "for services of an unusual character or duration" and following certification by the court and approval by the chief judge of the circuit in which the case is pending. *Ibid.*

Delaying a trial stretches investigative resources thinner, reducing their effectiveness. For instance, experts must be retained for longer periods of time, costing more money and requiring difficult rationing decisions. In fact, the Eleventh Circuit's rule may invite tactical delay on the government's part, as "[d]eliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal jus-

tice is imperiled." *Dickey* v. *Florida*, 398 U.S. 30, 43 (1970) (Brennan, J., concurring).[7]

This Court should grant certiorari in order to avoid unfair and unjust rationing decisions that may imperil the effective defense of individuals put on trial for their lives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GIOVANNA SHAY
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

PAULA SAUNDERS
MIKE UFFERMAN
FACDL Amicus Committee
P.O. Box 1528
Tallahassee, FL 32302

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

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[7] For specific examples of strategic governmental delay at trial, see, for example, *United States* v. *Becerra*, 435 F.3d 931, 934-35 (8th Cir. 2006) (concluding that "the government made a voluntary decision to delay [trial] in order to seek a strategic or tactical advantage," and noting that "similar tactics [have been] used by the government in other cases") (quotation omitted); and *United States* v. *Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996) (finding the government had delayed trial in a "deliberate act * * * to gain a tactical advantage").